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OUTLINES OF LECTURES
ON
JURISPRUDENCE

BY
ROSCOE L POUND

FOURTH EDITION

CAMBRIDGE

1928

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PREFACE TO THE FOURTH EDITION

AN unanticipated demand having exhausted the third edition, I have taken advantage of the need of reprinting to make a thorough revision.

Perhaps it should be said that these outlines were prepared for use in my course in jurisprudence, and solely with a view to the needs of that course. They presuppose a knowledge of the Anglo-American common law. The most persistent and perplexing of a teacher's problems is what to leave out. What is left out with one plan in mind may be quite relevant to another plan. Usually, however, where references which one might expect are omitted, it is because the matter will be found, with appropriate citations, in something else which is included. As to the systematic part (XXVII-XXXII), I seem to have learned, by twenty-eight years of trial and error, that it is best to use the system and systematic ideas of the nineteenth-century pandectists as a basis. Thus one may show how newer systematic ideas have grown up and how far they are merely reactions from the pandectist scheme. One may compare recent improvements of detail and canvass recent systematic controversies with reference to their historical setting. Thus the student may be led to work out a system from a survey of twentieth-century views and twentieth-century criticisms on the background of the received systematics of the last generation. The alternative method, namely, to set forth a systematic plan of one's own in detail, or to adopt that of some recent writer as a basis, results, in effect, in a teaching of that system as *the* system (and all systems are short-lived in their details) instead of a teaching of the principles of systematics of the law.

R. P.

December 1, 1927.

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THEORY OF LAW AND LEGISLATION

1

JURISPRUDENCE

I

WHAT IS JURISPRUDENCE?

Holland, *Jurisprudence*, chap. 1; Salmond, *Jurisprudence*, §§ 1-4; Gray, *The Nature and Sources of the Law*, §§ 288-321, 2 ed., pp. 133-151; Amos, *Science of Law*, chap. 2; Austin, *Jurisprudence*, lect. 1; Bryce, *Studies in History and Jurisprudence*, essay 12; Pollock, *Essays in Jurisprudence and Ethics*, essay 1; Clark, *Roman Private Law: Jurisprudence*, I, 1-39; Gareis, *Science of Law*, transl. by Kocourek, §§ 3-4 (pp. 13-28); Korkunov, *General Theory of Law*, transl. by Hastings, §§ 2-4; Brown, *The Austinian Theory of Law*, §§ 640-669.

Rottschaeffer, *Jurisprudence: Philosophy or Science*, 11 *Minnesota Law Rev.*, 293; Thorne, *Concerning the Scope of Jurisprudence*, 35 *American Law Rev.*, 546.

A developed system of law may be looked at from four points of view:

1. *Analytical*. — Examination of its structure, subject-matter, and precepts in order to reach by analysis the principles, theories, and conceptions which it logically presupposes.

2. *Historical*. — Investigation of its historical origin and development and of the origin and development of its institutions and doctrines in order to discover its general principles.

3. *Philosophical*. — Study of the philosophical bases of its institutions and doctrines; an attempt to reach its fundamental principles through philosophy.

4. *Sociological*. — Study of the system of law functionally as a social mechanism — as a part or phase of social control — and of its institutions and doctrines with respect to the social ends to be served.

Applied to the study of legal systems generally, these four methods are the *methods of jurisprudence*. The propriety of naming a comparative method as a method of jurisprudence may be doubted. The analytical, historical, and philosophical methods, as methods of jurisprudence, must be comparative.

When these methods, or some of them, are applied to the study of any particular system, the mode of treatment may be *dogmatic* (i. e. the practical exposition of its precepts and of its technique of developing and applying them) or *critical* (i. e. consideration of what its precepts and technique of developing and applying them ought to be in the light of analysis or history or philosophy or the social ends to be served, or of all of these). Analytical jurists hold that such criticism is no part of jurisprudence. Sociological jurists consider it an important part, and insist that in this criticism account must be taken of all the social sciences.

II

HISTORY OF JURISPRUDENCE

(TO THE NINETEENTH CENTURY)

1. *In antiquity.*

(a) Greek philosophical theories of justice and the social order.

Aristotle, *Nicomachean Ethics*, bk. v, bk. viii, 7, 2-4 (there is a convenient transl. by Browne in Bohn's Libraries); Aristotle, *Politics*, i, 1, 9, i, 13, iii, 1, iii, 4-5, iv, 12 (Jowett's transl. should be used); Plato, *Republic*, ii, 368, iii, 397-398 (Jowett's transl. should be used).

See Berolzheimer, *The World's Legal Philosophies*, 46-77; Vinogradoff, *Historical Jurisprudence*, II, chaps. 2-3; Pound, *Introduction to the Philosophy of Law*, 15-26.

(b) The beginnings of legal analysis — the "taking of differences" and framing of maxims.

Jhering, *Geist des römischen Rechts*, III, §§ 49-50; Jörs, *Römische Rechtswissenschaft zur Zeit der Republik*. Compare *The Hedaya* (Hamilton's transl.), bk. 16, chap. 1, Grady's ed., p. 244; Picot's Case, Y. B. 33 Ed. I (Horwood Ed.), 22-23; *The Executor's Case*, Id. 63; Note, *Keilway*, 41; Note, 2 Dyer, 111b in margin; 2 Dyer, 143b (pl. 57).

(c) The secularization of law.

Girard, *Manuel élémentaire du droit romain*, 7 ed., 44-48.

(d) The beginnings of a general science of law.

Daresté, *La science du droit en Grèce*, 1-18, 29-34; Cicero, *De oratore*, i, 41, § 189.

i. *The Ius Gentium* — rules universally applicable among civilized men, and hence applicable to foreigners. "A combination of comparative jurisprudence and rational speculation."

Buckland, *Text Book of Roman Law*, 52-55; Bruns-Lenel, *Geschichte und Quellen des römischen Rechts*, § 19 (in Holtzendorff, *Enzyklopädie der Rechtswissenschaft*, 7 ed., vol. I); Cicero, *De officiis*, iii, 17, 69; Cicero, *Oratoriae partitiones*, 37, 130; Gaius, i, 1; Inst. i, 2, pr. and 1-2; Dig. i, 1, 1-6, 9.

See Voigt, *Das Ius naturale, aequum et bonum, und Ius Gentium der Römer*, I, §§ 13–15, 42, 43, 79–88, 103; Karlowa, *Römische Rechtsgeschichte*, I, §§ 59–60; Kühlenbeck, *Entwicklungsgeschichte des römischen Rechts*, I, 205–235.

ii. The *Ius Naturale* — a speculative body of principles, serving as the basis of law making, juristic doctrine, and criticism, of potential applicability to all men, in all ages, among all peoples, derived from reason and worked out philosophically.

Cicero, *De officiis*, iii, 5, 23; Cicero, *De republica*, iii, 23, 33; Cicero, *Tusculan Disputations*, i, 13, 30; Inst., i, 2, pr. and 1–2; Dig. i, 1, 1–6, 9.

See Burle, *Essai historique sur le developpement de la notion de droit naturel dans l'antiquité grèque*; Bryce, *Studies in History and Jurisprudence*, essay 11; Maine, *Ancient Law*, chaps. 3–4 and Sir Frederick Pollock's notes E and F; Pollock, *Essays in the Law*, 31–79; Ritchie, *Natural Rights*, chap. 2; Salmond, *The Law of Nature*, 11 *Law Quarterly Rev.*, 122; Carlyle, *History of Medieval Political Theory*, I, chaps. 3–7; Voigt, *Das Ius naturale, aequum et bonum, und Ius Gentium der Römer*, I, §§ 15–41, 52–64, 98.

iii. The Schools of Law: Teachers and Writers.

Dig. i, 2, 2, §§ 47–53 (Monro's transl. may be used); Roby, *Introduction to the Study of Justinian's Digest*, chap. 9; Krüger, *Geschichte der Quellen und Literatur des römischen Rechts*, 2 ed., § 20; Kipp, *Geschichte der Quellen des römischen Rechts*, § 18; Baviera, *Le due Scuole dei Giureconsulti Romani*.

iv. The Classical Jurists.

Muirhead, *Historical Introduction to the Private Law of Rome*, 3 ed., §§ 55–73; Roby, *Introduction to the Study of Justinian's Digest*, chaps. 10–15; Girard, *Manuel élémentaire du droit romain*, 7 ed., 65–73.

v. The Fifth-Century Teachers.

Collinet, *The General Problems Raised by the Codification of Justinian*, *Revue d'histoire du droit*, IV, 1, 16–27.

2. *From the Twelfth Century to the Seventeenth.*

The history of modern legal science begins with the revival of the study of Roman law in the twelfth century.

See *Continental Legal History Series*, I, General Survey, 128 (§ 38)–175, 178 (§ 77)–199; Sohm, *Institutes of Roman Law*, transl. by Ledlie, Grueber's Introduction (in first ed. only), pp. i–xxxvi; Sohm, *Institutes of Roman Law*, transl. by Ledlie, 3 ed., §§ 24–28; Westlake, *Chapters on the Principles of International Law*, 17–51; Hastie, *Outlines of Jurisprudence*, 237–253, 260–271.

(a) The Lawyers.

i. The Glossators.

Continental Legal History Series, I, General Survey, 124–142, translated from Calisse, *Storia del diritto Italiano*; Vinogradoff, *Roman Law in the Middle Ages*, 44–58; Savigny, *Geschichte des römischen Rechts im Mittelalter*, V, 222–240; Stintzing, *Geschichte der deutschen Rechtswissenschaft*, I, 102 ff.; Salvioli, *Storia del diritto Italiano*, 8 ed., §§ 105–112, with full bibliography. See also Pertile, *Storia del diritto Italiano*, 2 ed., II, § 61; Del

Vecchio, *Di Irnerio e la sua scuola* (1869); Besta, *L'opera di Irnerio*, 2 vols. (1896); Landsberg, *Die Glosse des Accursius* (1883); Pescatore, *Die Glossen des Accursius* (1888).

ii. The Commentators.

Continental Legal History Series, I, General Survey, 356–378, translated from Calisse, *Storia del diritto Italiano*; Savigny, *Geschichte des römischen Rechts im Mittelalter*, V, 225–228, 353–356, VI, 1–25; Stintzing, *Geschichte der deutschen Rechtswissenschaft*, I, 106–133; Salvioli, *Storia del diritto Italiano*, 8 ed., §§ 113–115, with full bibliography.

As to Bartolus, see Continental Legal History Series, II, Great Jurists of the World, 58–108; Woolf, *Bartolus of Sassoferato*. Beale, *Bartolus on the Conflict of Laws*, contains a translation of the Commentary of Bartolus on Code, i, 4 — a good example of his method.

iii. The Humanists.

The French School — Jacobus Cujacius (Jacques Cujas, 1522–1590); Hugo Donellus (Doneau, 1527–1591).

Continental Legal History Series, I, General Survey, 147–154 (translated from Calisse, *Storia del diritto Italiano*) 252–259 (translated from Brissaud, *Manuel d'histoire du droit Français*); Continental Legal History Series, II, Great Jurists of the World, 58–108; Stintzing, *Geschichte der deutschen Rechtswissenschaft*, I, 133–154; Salvioli, *Storia del diritto Italiano*, 8 ed., §§ 124–131, with full bibliography.

(b) The philosophical Jurist-Theologians.

i. The Schoolmen.

Thomas Aquinas (1227 [or 1225]–1274).

DeWulf, *History of Medieval Philosophy*, II, §§ 269–289.

ii. The Protestant Jurist-Theologians.

The emancipation of Jurisprudence from Theology.

Hemmingsen (Hemmingius), *De lege naturae apodictica methodus* (1562) Q. 9. This passage may be found also in Kaltenborn, *Die Vorläufer des Hugo Grotius*, II, 31. Compare Grotius, *De iure belli ac pacis*, prolegomena, § 11 (1625).

See Hinrichs, *Geschichte der Rechts und Staatsprincipien seit der Reformation*, I, 28–37; Höffding, *History of Modern Philosophy*, transl. by Meyer, I, 42 ff.

iii. The Spanish Jurist-Theologians.

Universal as against nationalist theories.

Figgis, *Studies of Political Thought from Gerson to Grotius*, lect. 6.

Sources: Soto, *De iustitia et iure* (1589); Suarez, *De legibus ac deo legislatore* (1619).

Suarez, *De legibus*, i, 8, §§ 1–2, i, 9, § 2, ii, 19, § 9, xii, 13; Soto, *De iustitia et iure*, i, q. 5, art. 2.

3. *From the Seventeenth Century to the Nineteenth.*

(a) Emancipation of Law from the text of the *Corpus Iuris*.

François Hotman (Hotomannus, 1524–1590); Hermann Conring (1606–1681).

Hotman, *Anti-Tribonianus* (1567), chaps. 1–2, 7–9, 12–13; Conring, *De origine iuris germanici* (1643), chaps. 21–27, 32–34.

See Brissaud, *Cours d'histoire générale du droit Français*, I, 353; Dareste, *Étude sur François Hotman*, *Revue de législation et de jurisprudence*, 1850, II, 257; Stintzing, *Geschichte der deutschen Rechtswissenschaft*, II, 1–31, 165–188; *Continental Legal History Series*, I, General Survey, 428–429 (transl. from Stobbe, *Geschichte der deutschen Rechtsquellen*) II, 418–420; Brunner, *Grundzüge der deutschen Rechtsgeschichte*, § 64; Stobbe, Hermann Conring, *Der Begründer der deutschen Rechtsgeschichte* (1870).

(b) The Law-of-Nature School.

Hugo Grotius (De Groot, 1583–1645).

Continental Legal History Series, II, *Great Jurists of the World*, 169–184; Lysen, Hugo Grotius (1925); Vreeland, Hugo Grotius (1917); Knight, *Life and Works of Hugo Grotius* (1925); Pound, Grotius in the Science of Law, 19 *American Journal of International Law*, 685 (1925).

Sources: Grotius *de iure belli ac pacis* (1625) — Whewell's transl. (1853) is convenient, there is also an abridged transl. by Campbell (1901); Pufendorf, *De iure naturae et gentium* (1672) — Kennet's transl. (1703) may be found in several editions, and there is an abridged transl. by Spavan (1716); Burlamaqui, *Principes du droit naturel* (1747) — Nugent's transl. in several editions is useful; Wolff, *Institutiones iuris naturae et gentium* (1750); Rutherford, *Institutes of Natural Law* (1754–1756); Vattel, *Le droit des gens, préliminaires* (1758). There are many translations of Vattel.

Grotius, i, 1, 9–12; Burlamaqui, *Principes du droit naturel*, pt. 1, chap. 8, §§ 1–2, English transl. by Nugent, I, 76–78; Blackstone *Commentaries*, I, 38–43.

See *Continental Legal History Series*, II, *Great Jurists of the World*, 205–344, 447–476.

(c) The Law-of-Nature School in the Nineteenth Century.

i. The classical French Public Law.

Hauriou, *Précis de droit constitutionnel*, liv. I, chap. 1 (1923); Duguit, *Traité de droit constitutionnel*, 2 ed. (1921), I, §§ 14–16; Esmein, *Éléments de droit constitutionnel*, 7 ed. (1921), I, 539–563.

ii. Neo-Rousseauists.

Wilson, *The State*, §§ 1415–1460; Acolas, *Introduction à l'étude du droit* (1885), I, 2, 7; Acolas, *L'idée du droit* (1889), 29; Beaussire, *Les principes du droit* (1888), introduction, especially 1, 7, but compare 25 ff.

iii. The Law of Nature in America.

Marshall, C. J. in *Fletcher v. Peck*, 6 Cranch, 87, 135; Chase, J., in *Calder v. Bull*, 3 Dall. 386, 388; Field, J. in *Butchers Union Co. v. Crescent City Co.*, 111 U. S. 746, 762; Harlan, J. in *Chicago R. Co. v. Chicago*, 166 U. S. 226, 237; Cobb, J. in *Pavesich v. Life Ins. Co.*, 122 Ga., 190, 194; Winslow, J. in *Nunemaker v. State*, 129 Wis., 190, 198–203.

Green, J., in *State Bank v. Cooper*, 2 Yerger (Tenn.) 599, 602–603; Hosmer, C. J. in *Goshen v. Stonington*, 4 Conn. 209, 225; Mason, J. in *White v. White*,

5 Barb. (N. Y.) 474, 484-485; Jackson, J. in *Holden v. James*, 11 Mass. 396, 405; Knowlton, J. in *Com. v. Perry*, 155 Mass. 117, 121; Barculo, J. in *Benson v. Mayor*, 10 Barb. (N. Y.) 223, 244-245; *Per Curiam* in *Ham v. McClaws*, 1 Bay (S. C.) 93, 98. But see Andrews, J. in *Bertholf v. O'Reilly*, 74 N. Y. 509, 514-516; Moody, J. in *Twining v. New Jersey*, 211 U. S. 78, 106-107.

Story, J. in *Wilkinson v. Leland*, 2 Pet. 627, 657; Miller, J. in *Loan Assn. v. Topeka*, 20 Wall. 655, 662; Fuller, C. J. in *In re Kemmler*, 136 U. S. 436, 448; Deemer, J. in *State v. Barker*, 116 Ia. 96, 105; Brewer, J. in *State v. Nemaha County*, 7 Kan. 542, 555-556; Cooley, J. in *People v. Hurlbut*, 24 Mich. 44, 97-98; Allen, J. in *People v. Albertson*, 55 N. Y. 50, 57; Gibson, C. J. in *Norman v. Heist*, 5 Watts & S. 171, 173; Hines, C. J. in *Barbour v. Board of Trade*, 82 Ky. 645, 648-649. But see Garrison, J. in *Attorney General v. McGuiness*, 78 N. J. L. 346, 369 ff.; 1 Dillon, *Municipal Corporations*, 5 ed., § 98.

See Tucker, *A Few Lectures on Natural Law* (1844); Bishop, *Non-Contract Law* (1889), § 85; Smith, *The Law of Private Right* (1890), pt. 5, chap. 3; Andrews, *American Law* (2 ed., 1908), I, §§ 103-104; Haines, *The Law of Nature in State and Federal Decisions* (1916), 25 *Yale Law Journ.* 617; Pound, *Introduction to the Philosophy of Law*, 49-50.

III

SCHOOLS OF JURISTS: THE NINETEENTH-CENTURY SCHOOLS

1. *Methods and Schools.*

Berolzheimer, *The World's Legal Philosophies*, chaps. 5-7; Charmont, *La renaissance du droit naturel*, chaps. 1-5 (chap. 5 is translated in *Modern French Legal Philosophy*, 65-73); Vinogradoff, *Historical Jurisprudence*, I, 103-160 (*Methods and Schools of Jurisprudence*); Vinogradoff, *Aims and Methods of Jurisprudence*, 24 *Columbia Law Rev.* 1; Isaacs, *The Schools of Jurisprudence*, 31 *Harvard Law Rev.* 373.

2. *The Nineteenth-Century Schools.*

(a) *In general.*

Pollock, *Oxford Lectures*, 1-36; Pollock, *Essays in Jurisprudence and Ethics*, 1-30; Bryce, *Studies in History and Jurisprudence*, essay 12; Munroe Smith, *Jurisprudence*, 30-42; Brown, *The Austinian Theory of Law*, excursus F; Korkunov, *General Theory of Law*, transl. by Hastings, 23-30, 116-138; Lightwood, *The Nature of Positive Law*, chaps. 12-13; Lorimer, *Institutes of Law*, 2 ed., 38-54; Miller, *Lectures on the Philosophy of Law*, appendix E; Leonhard, *Methods Followed in Germany by the Historical School of Law*, 7 *Columbia Law Rev.*, 573; Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 *Harvard Law Rev.*, 591; Pound, *The Philosophy of Law in America*, *Archiv für Rechts- und Wirthschaftsphilosophie*, VII, 213, 385;

Pound, *The Spirit of the Common Law*, lect. 6; Dowdall, *The Present State of Analytical Jurisprudence*, 42 *Law Quarterly Rev.*, 451.

Clark, *Practical Jurisprudence*, 1-6; Amos, *Systematic View of the Science of Jurisprudence*, 40-43 (1872); Holland, *Elements of Jurisprudence*, 13 ed., 1-13; Puchta, *Cursus der Institutionen*, I, §§ 33-35 (1841), English transl. by Hastie, *Outlines of Jurisprudence*, 124-132; Fichte, *Grundlage des Naturrechts*, introduction, § 2 (1796), English transl. by Kroeger (as Fichte's *Science of Rights*), 16-21; Hegel, *Grundlinien der Philosophie des Rechts*, §§ 1-3 (1820), English transl. by Dyde (as Hegel's *Philosophy of Right*), 1-10; Boistel, *Cours de philosophie du droit*, §§ 1-2 (1899); Miller, *Data of Jurisprudence*, 1-2 (1902).

(b) Doctrines and Methods.

The nineteenth-century schools represent different phases of a reaction from the philosophical method of the seventeenth and eighteenth centuries.

Bluntschli, *Die neueren Rechtsschulen der deutschen Juristen* (1862); Bekker, *Ueber den Streit der historischen und der filosofischen Rechtsschule* (1886); Pound, *Interpretations of Legal History*, lect. I.

i. The Historical School.

Friedrich Carl von Savigny (1779-1861).

Continental Legal History Series, II, *Great Jurists of the World*, 561-589; Stintzing, *Friedrich Carl von Savigny*, (1862); Bethmann-Hollweg, *Erinnerung an Friedrich Carl von Savigny* (1867); Enneccerus, *Friedrich Carl von Savigny und die Richtung der neueren Rechtswissenschaft* (1879).

Small, *Origins of Sociology*, chap. 2.

"The Thibaut-Savigny Controversy: Continuity as a Phase of Human Experience." This chapter was printed first in 28 *American Journal of Sociology*, 711.

Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1814), chaps. 1, 2 (use 3 ed. 1840 or Haywood's transl.); Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, 230-231 (*World's Legal Philosophies*, 204); Dernburg, *Pandekten*, 8 ed., § 12.

For critiques of the Historical School, see Pound, *Interpretations of Legal History*, lect. 1; Korkunov, *General Theory of Law* (Hastings' transl.), 116-122; Charmont, *La renaissance du droit naturel*, 74-94; Stammler, *Ueber die Methode der geschichtlichen Rechtstheorie*; Bekker, *Recht des Besitzes*, § 1; Kantorowicz, *Lehre von dem richtigen Rechte*, 8; Manigk, *Savigny und der Modernismus im Recht*; Anderssen, *Die Wert der Rechtsgeschichte*; Lambert, *Études de droit commun législatif*, I, 127-141; Bonnet, *La philosophie du droit chez Savigny*.

The English Historical School is partly a development of the foregoing and partly a reaction from the English Analytical School.

Sir Henry Maine (1822-1888). See bibliography, *post*, p. 126.

Duff, *Sir Henry Maine* (1892); Vinogradoff, *The Teaching of Sir Henry Maine* (1904), 20 *Law Quarterly Rev.*, 119.

ii. The English Analytical School.

Precursors: Thomas Hobbes (1588–1679).

Jeremy Bentham (1748–1832).

Founder: John Austin (1790–1859).

See bibliography, *post*, p. 123.

On Hobbes, see Robertson, Hobbes (1886); Stephen, Hobbes (1904); Tönnies, Hobbes Leben und Lehre (1896); Graham, English Political Philosophy from Hobbes to Maine (1899). On Bentham, see Atkinson, Jeremy Bentham (1905); Phillipson, Three Criminal Law Reformers, pt. II, Bentham, (1923); Stephen, The English Utilitarians, vol. I (1900).

Preface (by Sarah Austin) to 3d and subsequent editions of Austin, Lectures on Jurisprudence; Gray, Nature and Sources of the Law, §§ 1–19, 2 ed., pp. 1–5; Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, 18–20 (World's Legal Philosophies, 9–11); Bergbohm, Jurisprudenz und Rechtsphilosophie, 12–20; Somló, Juristische Grundlehre, 33–37 (1917).

In the nineteenth century the philosophical method was continued by:

iii. The Metaphysical School.

Bonnecase, La notion de droit en France au dix-neuvième siècle, chaps. 1–3 (1919); Tourtoulon, Philosophy in the Development of Law, transl. by Read, 474–520.

Hegel, Grundlinien der Philosophie des Rechts, § 1; Ahrens, Cours du droit naturel, 8 ed., I, 1, II, 17–20; Lorimer, Institutes of Law, 2 ed., 353; Miller, Lectures on the Philosophy of Law, 9, 71–73; Geyer, Geschichte und System der Rechtsphilosophie, § 2; Boistel, Cours de philosophie du droit, §§ 1–2; Prins, La philosophie du droit et l'école historique (1882).

See Gray, Nature and Sources of the Law, 1 ed., §§ 7–9; Bryce, Studies in History and Jurisprudence, American ed., 631–634; Pollock, Essays in Jurisprudence and Ethics, 28–30; Korkunov, General Theory of Law (Hastings' transl.), § 4; Bergbohm, Jurisprudenz und Rechtsphilosophie, §§ 6–15; Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, I, vii.

In the latter part of the nineteenth century there was a tendency to bring the different methods together and to broaden the basis of both the historical and the philosophical schools.

Dahn, Rechtsphilosophische Studien, 288; Schuppe, Rechtswissenschaft und Rechtsphilosophie, Jahrbuch der internationalen Vereinigung für vergleichende Rechtswissenschaft, I, 215; Kohler, Rechtsphilosophie und Universalrechtsgeschichte, § 8.

iv. The "Comparative Method."

Meili, Institutionen der vergleichenden Rechtswissenschaft (1898) — a bibliography only.

Maine, Village Communities, lect. 1; Bryce, Studies in History and Jurisprudence, essay 11; Pollock, Essays in the Law, 1–30; Gray, Nature and Sources of the Law, §§ 292–314, 2 ed., pp. 134–148; Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, 21; Schuppe, Die Methoden der Rechtsphilosophie, Zeitschrift für vergleichende Rechtswissenschaft, V, 209;

Capitant, Conception, méthode, et fonction du droit comparé d'après R. Saleilles, *L'oeuvre juridique de Raymond Saleilles*, 65; Wenger, *Römisches Recht und Rechtsvergleichung*, *Archiv für Rechts- und Wirthschaftsphilosophie*, XIV, 1, 106.

IV

THE SOCIAL PHILOSOPHICAL SCHOOLS

Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 *Harvard Law Rev.*, 140; Tourtoulon, *Philosophy in the Development of Law*, 5-73; Jhering, *Law as a Means to an End*, 330-332; Stammler, *Theory of Justice*, transl. by Husik, 3-14 (transl. from pp. 1-11 of the first edition of the *Lehre von dem richtigen Rechte* — now somewhat altered in 2 ed., pp. 39-43); Kohler, *Rechtsphilosophie und Universalrechtsgeschichte*, §§ 8-10; Hocking, *The Present Status of the Philosophy of Law and of Rights*, chaps. 1-5.

At the end of the nineteenth century a revolt from the historical school, which had all but supplanted philosophical jurisprudence, and a new development of the philosophical school, resulted in:

(a) Three well-marked types of *social philosophical jurisprudence*.

(1) THE SOCIAL UTILITARIANS

Rudolf von Jhering (1818-1892).

Continental Legal History, series II, *Great Jurists of the World*, 590-599; Munroe Smith, *Four German Jurists*, 10 *Political Science Quarterly*, 664, 11 *Id.* 278, 12 *Id.* 21; Rudolf von Jhering in *Briefen an seine Freunde* (1913).

Jhering, *Law as a Means to an End*, transl. by Husik, preface, pp. lviii-lix, chap. 1, § 1 (pp. 1-3), chap. 3, § 5 (pp. 32-35), chap. 7 (pp. 71-74); Jhering, *Scherz und Ernst in der Jurisprudenz*, pt. 3 (*Im juristisches Begriffshimmel*); Jhering, *Geist des römischen Rechts*, III, 1, § 60; Jhering, *Law as a Means to an End*, chap. 5, § 4 (pp. 49-51), chap. 8, § 10 (pp. 239-246).

Sternberg, *Allgemeine Rechtslehre*, I, 190-191; Saleilles, *Individualisation of Punishment*, transl. by Jastrow, 8-10; Cardozo, *The Growth of the Law*, lect. 2.

Critiques of Jhering: Merkel, Rudolf von Jhering, appendix I to *Law as a Means to an End*, transl. by Husik (the original may be found in Merkel, *Gesammelte Abhandlungen*, II, 733); Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, § 43, *The World's Legal Philosophies*, 337-351; Berolzheimer, *Rechtsphilosophische Studien*, 143-148; Stammler, *Wirtschaft und Recht*, § 100; Stammler, *Theory of Justice*, transl. by Husik, 148-155 (translated from *Lehre von dem richtigen Rechte*, 1 ed., 191-195, in 2 ed. this is much altered); Korkunov, *General Theory of Law*, transl. by Hastings, §§ 13-14; Tanon, *L'évolution du droit et la conscience sociale*, 3 ed., 44-81, transl. in appendix II to Jhering, *Law as a Means to an End*, transl. by Husik; Radbruch, *Grundzüge der Rechtsphilosophie*, 18-21.

(2) THE NEO-KANTIANS

Rudolf Stammler (1856-).

Stammler's Writings: Ueber die Methode der geschichtlichen Rechtstheorie (1888), reprinted in *Rechtsphilosophische Abhandlungen*, I, 1-40; *Wirtschaft und Recht* (1896, 5 ed., 1924); *Die Gesetzmässigkeit in Rechtsordnung und Volkswirtschaft* (1902), reprinted in *Rechtsphilosophische Abhandlungen*, I, 169-184; *Lehre von dem richtigen Rechte* (1902, 2 ed., 1926); *Wesen des Rechts und der Rechtswissenschaft*, in *Die Kultur der Gegenwart* (1906); *Systematische Theorie der Rechtswissenschaft* (1911, 2 ed., 1923); *Rechts und Staatstheorien der Neuzeit* (1917); *Lehrbuch der Rechtsphilosophie* (1922, 2 ed. 1923); *Fundamental Tendencies of Modern Jurisprudence*, 21 *Michigan Law Rev.*, 623, 765.

Stammler, *Wirtschaft und Recht*, §§ 32-33; Stammler, *Theory of Justice*, transl. by Husik, 9-11 (§ 2), 19-21, 72-73, 89-91, 152-155 (§ 5), 160-166; Kantorowicz, *Zur Lehre vom richtigen Recht*, 9.

Critiques of Stammler: Drake, *Juristic Idealism and Legal Practice*, 25 *Michigan Law Rev.*, 571, 752; Geny, *The Critical System (Idealistic and Formal) of R. Stammler*, appendix I to *Theory of Justice*, transl. by Husik (transl. of Geny, *Science et technique en droit privé positif*, II, 127-190); Wu, *Stammler and his Critics*, *Theory of Justice*, transl. by Husik, appendix II; Berolzheimer, *System der Rechts- und Wirtschaftsphilosophie*, II, § 48, *World's Legal Philosophies*, 398-422; Croce, *Historical Materialism and the Economics of Karl Marx*, chap. 2; Kantorowicz, *Zur Lehre vom richtigen Recht*; Binder, *Rechtsbegriff und Rechtsidee* (1915); Binder, *Kritische und metaphysische Rechtsphilosophie*, *Archiv für Rechts- und Wirtschaftsphilosophie*, IX, 142, 267; Wielikowski, *Die Neu Kantianer in der Rechtsphilosophie* (1914); Radbruch, *Grundzüge der Rechtsphilosophie*, 21-24.

See also Richard, *La question sociale et la mouvement philosophique au XIX^e siècle*, chaps. 4, 5; Picard, *La philosophie sociale de Renouvier*, chap. 3.

(3) THE NEO-HEGELIANS

Josef Kohler (1849-1919).

Kohler's Writings on jurisprudence and philosophy of law: *Shakespeare vor dem Forum der Jurisprudenz* (1883, 2 ed., 1919); *Recht, Glaube und Sitte* (1892); *Zur Urgeschichte der Ehe* (1897); *Einführung in die Rechtswissenschaft* (1902, 5 ed., 1919); *Rechtsphilosophie und Universalrechtsgeschichte* (in Holtzendorff, *Enzyklopädie der Rechtswissenschaft*, 6 ed., 1904, 7 ed., 1915); *Moderne Rechtsprobleme* (1907, 2 ed., 1913); *Lehrbuch der Rechtsphilosophie* (1908, 3 ed. by Arthur Kohler, 1923), the first ed. transl. by Albrecht as "*Kohler's Philosophy of Law*" (1914); *Recht und Persönlichkeit in der Kultur der Gegenwart* (1914).

Heymann, Seeberg, Klee, und Schmidt, *Josef Kohler zum Gedächtniss* (1920); Osterrieth, *Josef Kohler* (1920); Rabel, *Josef Kohler, Reinische Zeitschrift für Zivil und Prozessrecht*, X, 123; Adam, *In Memoriam, Josef Kohler, Zeitschrift für vergleichende Rechtswissenschaft*, XXXVIII, 1; Fleischmann, *Josef Kohler zum Gedächtniss, Zeitschrift für Völkerrecht*, XI, 1.

Kohler, *Lehrbuch der Rechtsphilosophie*, 3 ed., 1-21, 28-32; Kohler, *Philosophy of Law*, transl. by Albrecht, 25-27 (altered in 3d ed. of original); Kohler,

Moderne Rechtsprobleme, 2 ed., § 1; Kohler, *Philosophy of Law*, transl. by Albrecht, 1-2 (somewhat altered in 3 ed. of original); Kohler, *Rechtsphilosophie und Universalrechtsgeschichte*, § 8; Kohler, *Lehrbuch des bürgerlichen Rechts*, I, §§ 38, 39; Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, § 48, iv (*The World's Legal Philosophies*, 422-431); Berolzheimer, *Zum Methodenstreit in der Rechtsphilosophie der Gegenwart*, *Archiv für Rechts- und Wirthschaftsphilosophie*, IV, 56.

For critiques of Kohler, see: Pound, *Interpretations of Legal History*, 141-151; Geny, *Science et technique en droit privé positif*, II, 111-126; Hocking, *The Present Status of the Philosophy of Law and of Rights*, chaps. 3-4; Lasson, *Kohler's Philosophy of Law*, appendix II to Albrecht's transl. (transl. of review in *Archiv für Rechts- und Wirthschaftsphilosophie*, II, 318); Castilho y Duarte, *Kohler's Philosophical Position*, appendix III to Albrecht's transl. of the *Lehrbuch der Rechtsphilosophie* (transl. from the introduction to the Spanish transl. of Kohler's *Rechtsphilosophie und Universalrechtsgeschichte*).

(b) Recently a Neo-Idealist social-philosophical school seems to be arising — a logical-psychological relativist idealism.

Tourtoulon, *Principes philosophiques de l'histoire du droit*, bk. ii, chaps. 13-15, English transl. (*Philosophy in the Development of Law*), 416-563; Radbruch, *Grundzüge der Philosophie des Rechts*, 29-42, 82-104, 184-211; Binder, *Philosophie des Rechts*, 118-288.

(c) In France the same movement took the form of a *Revival of Natural Law*.

Beudant, *Le droit individuel et l'état* (1891, 3 ed., 1920); Salleilles, *L'École historique et droit naturel d'après quelques ouvrages récents*, *Revue trimestrielle de droit civil*, I, 80 (1902); Charmont, *La renaissance du droit naturel* (1910) — see *Modern French Legal Philosophy*, §§ 43-103, for translation of part of this book — §§ 78-103 are important in the present connection; Geny, *Science et technique en droit privé positif*, II, §§ 134-140, 177; Demogue, *Notions fondamentales du droit privé*, 21-22; Duguit, *Les transformations générales du droit privé depuis le code Napoléon*, 24-29 (1912), transl. in *Continental Legal History Series*, XI, *Progress of Continental Law in the XIX Century*, 24-28; Duguit, *Law and the State*, 31 *Harvard Law Rev.*, 180-181. See also Jung, *Das Problem des natürlichen Rechts* (1912).

The Philosophical Schools Compared

<i>Law-of-Nature</i>	<i>Metaphysical</i>	<i>Social-Philosophical</i>
Sought to deduce a complete system of principles, of universal validity, from the nature of man in the abstract, and to develop these principles into an all-sufficient code of legal rules.	Sought to deduce from some single fundamental idea a complete system of principles of universal validity to which jurists should endeavor to make the actual law conform.	Studies the ideal element of the actual law and seeks materials for criticism and for constructive law-making on the basis of some form of social philosophy.

The Types of the Social-Philosophical School

	<i>Social-Utilitarians</i>	<i>Neo-Kantians</i>	<i>Neo-Hegelians</i>
<i>Tendency</i>	Analytical and social-philosophical	Philosophical and sociological	Historical and sociological
<i>Leading Representative</i>	Rudolf von Jhering (1818-1892)	Rudolf Stammler (1856-)	Josef Kohler (1849-1919)
<i>Achievements</i>	(1) Overthrow of the "jurisprudence of conceptions." (2) Insistence upon the interests which the legal system secures rather than upon the rights by which it secures them. (3) The theory of punishment as something to be adjusted to the criminal rather than to the nature of the crime. (4) Recognition in recent Continental thought of the imperative idea of law. (5) Giving us a theory of the administrative element in the legal order.	(1) Turning attention from the relation of morals and ethics to abstract rules and directing it to the relation of these matters to the administration of justice through rules. (2) The theory of the social ideal as the criterion of justice through rules. (3) Adding a theory of the just decision of causes to the theory of making just rules. (4) Giving us a theory of the application of legal precepts.	(1) The theory of law as the product of the civilization of a people. (2) The theory of the relation of comparative legal history and the philosophy of law. (3) Theory of the sociological interpretation and application of legal rules. (4) The method of formulating the jural postulates of the civilization of the time and place.

V

THE ECONOMIC INTERPRETATION

Pound, *Interpretations of Legal History*, lects. 2-5.

(a) Interpretations of history.

See Seligman, *The Economic Interpretation of History*, 2 ed.; Small, *General Sociology*, 44-62; Barth, *Die Philosophie der Geschichte als Soziologie*, 200-346, 2 ed., 483-809. For the geographical interpretation, see Semple, *Influences of Geographic Environment* (1911); Febure, *A Geographical Introduction to History*, transl. by Mountford and Paxton (1925), with full bibliography. For the ethnological interpretation, see Pittard, *Race and History*, transl. by Collum (1926), with full bibliography; Gumpłowicz, *Der Rassenkampf* (1883). For the economic interpretation, see Patten, *The Development of English Thought, a Study in the Economic Interpretation of History* (1899); Croce, *Historical Materialism and the Economics of Karl Marx*, chap. 2.

(b) Interpretations of jurisprudence and legal history.

(1) Idealistic interpretations.

(i) Ethical.

Hastie, *Outlines of Jurisprudence*, 152–153 (transl. of Friedländer, *Juristische Enzyklopädie*, 65).

(ii) Religious.

Stahl, *Philosophie des Rechts*, 5 ed., II, § 5 (p. 4); De Zulueta, *The Girard Testimonial Essays*, 30 *Law Quarterly Rev.*, 214, 216–217; Pound, *The Spirit of the Common Law*, lect. 2. See also Albertsworth, *Current Religious Thought and Modern Juristic Movements*, 34 *International Journal of Ethics*, 364.

(iii) Political.

Lorimer, *Institutes of Law*, 2 ed., 353–356; Hastie, *Outlines of Jurisprudence*, 5, 7, 24–28 (Puchta, *Cursus der Institutionen*, §§ 2, 3, 9); Maine, *Ancient Law*, last two paragraphs of chap. 5.

(2) Geographical interpretations.

Randall, *Law and Geography*, *Evolution of Law Series*, III, *Formative Influences of Legal Development*, 198–214; Semple, *The Influences of Geographic Environment on Law, State, and Society*, Id., 215–233 (extracts from “*Influences of Geographic Environment*”); Declareuil, *Histoire du droit Français*, chap. 1 (1895).

(3) Ethnological interpretations.

(i) Idealistic.

Jhering, *Geist des römischen Rechts*, I, § 19; Muirhead, *Historical Introduction to the Private Law of Rome*, § 1. But see Voigt, *Römische Rechtsgeschichte*, I, § 2; Cuq, *Institutions juridiques des Romains*, I, 29–30; Kuhlenbeck, *Entwicklungsgeschichte des römischen Rechts*, I, 31–40. Compare Hegel, *Grundlinien der Philosophie des Rechts*, §§ 346–347 (Dyde’s transl., 343–344).

(ii) Psychological.

Carle, *La vita del diritto*, 2 ed., bk. v; Fouillée, *L’Idée moderne du droit*, 6 ed., bk. I, introduction and chap. 5 (*Modern French Legal Philosophy*, chaps. I and II).

(iii) Positivist.

Post, *Die Grundlagen des Rechts*, 8–9.

For critique, see Tourtoulon, *Principes philosophiques de l’histoire du droit*, 89–131, *Philosophy in the Development of Law*, 84–95. See also Lowie, *Anthropology and Law*, in Ogburn and Goldenweiser, *The Social Sciences*, 50–57.

(c) The economic interpretation.

On another side the same movement that led to the social-philosophical schools led to the Economic Interpretation — a method which had for a time much vogue, without giving us any general treatises on jurisprudence or a general school of jurists.

Loria, *Economic Foundations of Law, Evolution of Law Series, III, Formative Influences of Legal Development*, 234–266 (Keasbey's transl. "Economic Foundations of Society," 73–114).

Follett, *Creative Experience*, 257–258; Hocking, *Man and the State*, 280–299; Hale, *Economics and Law*, in Ogburn and Goldenweiser, *The Social Sciences*, 131–142.

(1) Idealistic — The realization of an economic idea.

Croce, *The Philosophy of Hegel*, 201–202.

(2) Mechanical-Positivist.

Centralization and the Law, 23, 31–35, 63–64, 132–133; Adams, *The Modern Conception of Animus*, 19 *Green Bag*, 12, 17, 32–33. See Bohlen, *Studies in the Law of Torts*, 344, 368–377, reprinted from 59 *University of Pennsylvania Law Rev.*, 298, 318–325. For critiques, see Stammeler, *Sozialismus und Christentum*, 58–69 (1920); Croce, *Riduzione della filosofia del diritto alla filosofia dell' economia* (1907); Burdick, *Is Law the Expression of Class Selfishness?* 25 *Harvard Law Rev.*, 349.

(3) Realist.

See Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, § 40, *The World's Legal Philosophies*, 298–307.

VI

SOCIOLOGICAL JURISPRUDENCE

Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 *Harvard Law Review*, 489; Pound, *The Need of a Sociological Jurisprudence*, 19 *Green Bag*, 107; Kantorowicz, *Rechtswissenschaft und Soziologie*, 1–15, 21–30, 30–34; Tanon, *L'évolution du droit et la conscience sociale*, 3 ed., 143–176, 196–202; Brugges, *Le droit et la sociologie*, Introduction and chaps. 1, 2, 6; Van der Eycken, *Méthode positive de l'interprétation*, 109–112; Rolin, *Prolégomènes à la science du droit*, 1–9; Ehrlich, *Erforschung des lebenden Rechts*, Schmoller, *Jahrbuch für Gesetzgebung*, XXXV, 129; Ehrlich, *Grundlegung der Soziologie des Rechts*, chap. 21; Page, *Professor Ehrlich's Czernowitz Seminar of Living Law*, Proceedings of Fourteenth Annual Meeting of the Association of American Law Schools, 46; Cardozo, *The Nature of the Judicial Process*, lects. 2–3; Pound, *Sociology and Law*, in Ogburn and Goldenweiser, *The Social Sciences*, 319–328.

The Sociological School arose, under the influence of the positivist philosophy, as another phase of the movement considered under III and IV, *supra*.

The forerunner is Montesquieu (1689–1755).

See Continental Legal History Series, II, Great Jurists of the World, 417-446; Ehrlich, Montesquieu and Sociological Jurisprudence, 29 Harvard Law Review, 582.

(1) THE MECHANICAL STAGE

For critiques, see Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 44 (The World's Legal Philosophies, 351-374); Charmont, La renaissance du droit naturel, chap. 5 (Modern French Legal Philosophy, 65-73); Korkunov, General Theory of Law, transl. by Hastings, 265-266.

(2) THE BIOLOGICAL STAGE

Post, Der Ursprung des Rechts, 7; Richard, Origine de l'idée de droit, 5, 54-55; Vaccaro, Les bases sociologiques du droit et de l'état, 450-452.

For critiques, see Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 47, 51, The World's Legal Philosophies, 387-391, 456-466; Tourtoulon, Principes philosophiques de l'histoire du droit, 80-88, 132-173 (Philosophy in the Development of Law, 76-83, 96-133).

(3) THE PSYCHOLOGICAL STAGE

Gabriel Tarde (1843-1904).

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, § 49 (The World's Legal Philosophies, 431-446); Tarde, Les transformations du droit; Tourtoulon, Principes philosophiques de l'histoire du droit, 174-253 (Philosophy in the Development of Law, 134-211); Tanon, L'évolution du droit et la conscience sociale, 3 ed., 143-176.

Gierke, Deutsche Genossenschaftsrecht, I, 1; Gierke, Das Wesen der menschlichen Verbände, 33-34; Gierke, Die Genossenschaftstheorie und die deutsche Rechtssprechung, 10 ff.; Gierke, Die Grundbegriffe des Staatsrecht und die neueste Staatstheorien, Zeitschrift für die gesammte Staatsrechtswissenschaft, XXX, 304.

Ward, Dynamic Sociology, I, 463-472, 704-706, II, 11-17; Ward, The Psychic Factors of Civilization, 120; Ward, Applied Sociology, 13.

Tarde, Laws of Imitation, transl. by Parsons, 2-3, 11-13, 14-15, 310-320.

Bruguières, Le droit et la sociologie, chap. 6.

Legal method: Science of Legal Method (Modern Legal Philosophy Series, vol. 9); Les méthodes juridiques (lectures by French jurists, 1910); Wurzel, Das juristische Denken; Bozi, Die Weltanschauung der Jurisprudenz; Carozo, The Nature of the Judicial Process, lect. 4.

(4) THE STAGE OF UNIFICATION

Roguin, La règle de droit, 8; Vander Eycken, Méthode positive de l'interprétation, 112; Kantorowicz, Rechtswissenschaft und Soziologie, 8; Bruguières, Le droit et la sociologie, 160 ff.

Vinogradoff, The Crisis of Modern Jurisprudence, 29 Yale Law Journal, 312.

Ward, Pure Sociology, 12-14; Small, General Sociology, 91; Small, The Meaning of Social Science, 87.

Pound, Interpretations of Legal History, 116-140, 151-165.

The principal schools of jurists compared:

ANALYTICAL	HISTORICAL	PHILOSOPHICAL	SOCIOLOGICAL
Consider developed systems only.	Consider the past rather than the present of law; or the present through the past only.	Seek ideal standards by which to criticise the law that exists.	Consider the working of law more than its abstract content.
Regard law as something made consciously by law-givers, legislative or judicial.	Regard law as something that is not and in the long run cannot be made consciously.	Agree with the historical jurist that law is not made, but is found.	Regard law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort.
See chiefly the force and constraint behind legal rules; conceive that the sanction of law is enforcement by the judicial organs of the state, and that nothing which lacks an enforcing agency is law.	See chiefly the social pressure behind legal rules; find sanction in habits of obedience, displeasure of one's fellow-men, public sentiment or opinion, or the social standard of justice.	Look at the ethical bases of rules rather than at their sanction.	Lay stress upon the social purposes which law subserves rather than upon sanction; regard means of making legal precepts effective in action as one of the problems of legal science.
Take statute as the typical law.	Take custom or those customary modes of decision that make up a body of juristic tradition or of case law as the type of law.	Have no necessary preference for any form of law.	Look upon legal institutions, precepts, and doctrines functionally and regard the form as a matter of means only.
Their philosophical views are utilitarian or teleological.	As a rule they have been Hegelians.	Hold very diverse philosophical views. In the XIX century Hegelians or Krauseans. Today some form of the Social-Philosophical School.	Their philosophical views are very diverse. Chiefly they are (a) Social-Philosophical of one type or another, (b) Positivists, (c) Pragmatists.

THE PROGRAMME OF THE SOCIOLOGICAL SCHOOL

Sociological jurists insist upon eight points:

(1) Study of the actual social effects of legal institutions, legal precepts, and legal doctrines.

Ehrlich, *Grundlegung der Soziologie des Rechts*, chap. 21; Ehrlich, *Die Erforschung des lebenden Rechts*, Schmoller's *Jahrbuch für Gesetzgebung*,

XXXV, 190; Ehrlich, *Das lebende Recht der Völker von Bukowina* (1913); Page, *Professor Ehrlich's Czernowitz Seminar of Living Law*, *Proceedings of Fourteenth Annual Meeting of the Association of American Law Schools*, 46; Kantorowicz, *Rechtswissenschaft und Soziologie*, 7-8; Vander Eycken, *Méthode positive de l'interprétation*, 109.

(2) Sociological study in preparation for law-making.

Kantorowicz, *Rechtswissenschaft und Soziologie*, 9; Tanon, *L'évolution du droit et la conscience sociale*, 3 ed., 196-198; Willcox, *The Need of Social Statistics as an Aid to the Courts* (1913); Oliphant, *The Relation of Current Economic and Social Problems to the Restatement of the Law* (reprint from *Acad. Pol. Sci.*, N. Y., 1923).

(3) Study of the means of making legal precepts effective in action.

Pound, *The Need of a Sociological Jurisprudence*, 19 *Green Bag*, 607; Pound, *Law in Books and Law in Action*, 44 *American Law Review*, 12; Pound, *The Limits of Effective Legal Action*, 27 *International Journal of Ethics*, 150; Pound, *The Administration of Justice in the Modern City*, 26 *Harvard Law Rev.*, 302; Parry, *The Law and the Poor*, 248-249; Smith, *Justice and the Poor* (1919); Gurney-Champion, *Justice and the Poor in England*, chaps. 1-7 (1926).

(4) Study of juridical method.

Cardozo, *The Nature of the Judicial Process* (1921); Cardozo, *The Growth of the Law*, lect. 3; Pound, *The Theory of Judicial Decision*, 36 *Harvard Law Rev.*, 641, 802, 940; Wigmore, *Problems of Law*, 65-101; *Science of Legal Method*, *Modern Legal Philosophy Series*, vol. 9, especially Wurzel, *Juridical Thinking*, § 30, pp. 422-428; Isaacs, *How Lawyers Think*, 23 *Columbia Law Rev.*, 555; Waite, *Caveat Emptor and the Judicial Process*, 25 *Columbia Law Rev.*, 131; Geny, *Méthode d'interprétation*, 2 ed., I, § 7; *Les méthodes juridiques* (lectures by a number of French jurists, 1911); Bozi, *Die Weltanschauung der Jurisprudenz* (2 ed., 1911); Hellwig, *Zur Psychologie der richterlichen Urteilsfindung* (1914); Ehrlich, *Die juristische Logik* (1918).

(5) A sociological legal history; study of the social background and social effects of legal institutions, legal precepts, and legal doctrines, and of how these effects have been brought about.

Brugelles, *Le droit et la sociologie*, 160; Kantorowicz, *Rechtswissenschaft und Soziologie*, 33-34; 1 Wigmore, *Evidence*, § 865; Salvioli, *Storia del diritto Italiano*, 8 ed., preface (1921).

(6) Recognition of the importance of individualized application of legal precepts — of reasonable and just solutions of individual cases.

Hollams, *Jottings of an Old Solicitor*, 160-162; Pound, *Enforcement of Law*, 20 *Green Bag*, 401; Pound, *The Administrative Application of Legal Standards*, 44 *Rep. Am. Bar Assn.*, 445 (1919); Gnaeus Flavius (Kantorowicz), *Der Kampf um die Rechtswissenschaft*; Kantorowicz, *Rechtswissenschaft und Soziologie*, 11 ff.

(7) In English-speaking countries, a Ministry of Justice.

Bentham, *Works* (Bowring ed.) IX, 597-612; Ferri, *Criminal Sociology*, transl. by Morrison, 153; Nash, *Life of Lord Westbury*, I, 191; Pound, *Juristic*

Problems of National Progress, 22 *American Journal of Sociology*, 721; Pound, Anachronisms in Law, 3 *Journal of the American Judicature Society*, 142, 146; Report of Lord Haldane's Committee on the Machinery of Government (1918); Cardozo, A Ministry of Justice, 35 *Harvard Law Rev.*, 113; Pound, Criminal Justice in the American City, *Criminal Justice in Cleveland*, 605-606; Glueck, The Ministry of Justice and the Problem of Crime, 4 *American Rev.*, 139; Reports of the Commission to Investigate Defects in the Law and its Administration, New York Legislative Documents, nos. 70 (1924), 74 (1925). For critique, see Birkenhead, *Points of View*, I, 92-130.

(8) That the end of juristic study, toward which the foregoing are but some of the means, is to make effort more effective in achieving the purposes of law.

Kohler's Introduction in Rogge, *Methodologische Vorstudien zu einer Kritik des Rechts*, viii.

CHARACTERISTICS OF RECENT LEGAL SCIENCE

(1) The functional attitude.

(2) Study of law in relation to and as part of the whole process of social control.

(3) The movement for preventive justice.

Pound, Preventive Justice and Social Work, *Proceedings of the National Conference of Social Work*, 1923, 151.

(4) The movement for individualization.

Geny, *Méthode d'interprétation en droit privé positif*, 2 ed. (1919); Pound, Courts and Legislation, *Science of Legal Method* (Modern Legal Philosophy Series, vol. 9) 202-228; *Science of Legal Method*, chaps. i-v; Ransson, *Essai sur l'art de juger* (1912); Kantorowicz, *Die Kampf um die Rechtswissenschaft* (1906); Brütt, *Die Kunst der Rechtsanwendung* (1907); Saleilles, *Individualization of Punishment* (transl. by Mrs. Jastrow) chap. 9; Pound, *Administrative Application of Legal Standards*, 44 *Rep. Am. Bar Assn.*, 445.

(5) The movement for team work with the other social sciences.

THE PROBLEMS OF JURISPRUDENCE TODAY

(1) The valuing of interests.

See *post*, Lect. XIV.

(2) The relation of law to administration.

Pound, Introduction to the Philosophy of Law, lect. 3; Pound, *The Administrative Application of Legal Standards*, 44 *Rep. Am. Bar Assn.*, 445; Isaacs, *The Limits of Judicial Discretion*, 32 *Yale Law Journ.*, 339; von Laun, *Das freie Ermessen und seine Grenzen* (1910).

See *post*, Lect. XIX.

(3) The limits of effective legal action.

See *post*, Lect. XIV.

(4) The means of informing judges, jurists and law-makers as to the social facts involved in legislation and in the judicial finding, shaping, and application of legal precepts.

In this connection reference should be made to the well-known briefs of Mr. Justice Brandeis (when at the bar) in *Muller v. Oregon*, 208 U. S. 412 and *Ritchie v. Wayman*, 244 Ill. 509. See also, Willcox, *The Need of Social Statistics as an Aid to the Courts* (1913); Palfrey, *The Constitution and the Courts*, 26 *Harvard Law Rev.*, 507, 525-530.

(5) Improvement in the form of the law — “restatement,” codification.

See *post*, Lect. XVIII.

DEFINITIONS OF JURISPRUDENCE FOR DISCUSSION IN CONNECTION WITH THE FOREGOING

The formal science of positive law. — Holland, *Elements of Jurisprudence*, 13 ed., 13.

Scientific knowledge of the history and system of right (law). — Puchta, *Cursus der Institutionen*, I, § 33.

The ultimate object of jurisprudence is the realization of the idea in the ideal of humanity, the attainment of human perfection, and this object is identical with the object of ethics. . . .

The proximate object of jurisprudence, the object which it seeks as a separate science (i. e. from ethics) is liberty. But liberty, being the perfect relation between human beings, becomes a means towards the realization of their perfection as human beings. Hence jurisprudence, in realizing its special or proximate object, becomes a means towards the realization of the ultimate object which it has in common with ethics. The relation in which jurisprudence stands to ethics is thus a subordinate one, the relation of species to genus. — Lorimer, *Institutes of Law*, 2 ed., 353, 355.

The science of the human will, in the distinction of the particular from the universal, and in the relation of the particular to the universal. — Herkless, *Jurisprudence*, 1.

Jurisprudence has for its subject law, that is, an aggregate of standards which determine the mutual relations of men living in a community. — Arndts, *Juristische Encyclopädie*, § 1.

Juristic encyclopedia, accordingly, is a systematic, unified survey of the means of peaceable adjustment of the external relations of mankind and social communities. — Gareis, *Science of Law*, transl. by Kocourek, 26.

It is at once a philosophy, a science, and an art. As a philosophy, its desire is to understand justice; as a science, its purpose is to explain the evolution of justice; as an art, its aim is to formulate those rules of conduct essential to the realization of justice. Conceived in this manner, jurisprudence forms the background of all associated activity; it provides the framework that limits and con-

trols the exercise of liberty; it reflects the color and resounds the tone of those unconscious premises of action which give character to a civilization. The law is neither a schoolmaster for instruction nor a guardian for command; it is rather the expression of the ethical sense of a community crystallized about the problem of common living. — Adams, *Economics and Jurisprudence*, 8.

The science of law in the wider sense is our whole knowledge of law. But this knowledge is on the one hand practical, on the other hand philosophical. Accordingly it may be divided into the science of law in its narrower and more proper sense, called jurisprudence, and the philosophy of law. — Sternberg, *Allgemeine Rechtslehre*, I, § 12.

General theory of law investigates the formal (constructive) side of fundamental juristic conceptions and legal institutions; the philosophy of law investigates their material kernel and basis. — Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, 20.

The Science of Justice as practiced in civilized nations. — Beale, *The Development of Jurisprudence during the Nineteenth Century: Select Essays in Anglo-American Legal History*, I, 558.

The theory of law may set itself narrower or wider limits for its task. Accordingly it is either jurisprudence in the narrower sense, or philosophy of law.

In its narrower limitation, jurisprudence has to do primarily with the immediate application of law, the carrying out of the existing law, juristic technique. . . . It inquires only with respect to the law as to which we can say that it obtains, that it is in force, that is, that it is generally recognized as furnishing a measure for the events of life, for legal transactions, for wrongs, for tax administration, for acts of police, for affairs of international intercourse and the like. In the modern state this is chiefly the written law. — Schmidt, *Einführung in das Recht*, 2 ed., § 4.

The field of the science of law is not nature, but civilization. The fundamental conception with which the jurist must work is not causality, what must be, but freedom, what ought to be. The rules with which the science of law has to do are not theoretical but practical, and the world which comes under its investigation is that of ideas. — Binder, *Philosophie des Rechts*, 852.

Rule, idea, and life — jurisprudence has a share in all three of these. It has for its subject-matter the imperative of the lawgiver, a will, and so it is equally near to and far from the world of what ought to be and of values and the world of what is practicable and of what is. — Radbruch, *Grundzüge der Rechtsphilosophie*, 211.

Law is a social phenomenon, like religious, moral, political and economic phenomena. . . .

It is evident that there can be no question here of a science in the sense of the natural sciences. They have for their object the study of material things, and the phenomena of material things are their theatre. These things are animate or inanimate, and the rôle of natural science is to study their constitution and the forces of life which are active in them or upon them. Now the law looks upon man not as a material being submitted to physical laws of life, but as a thinking man, a reasonable man, creating rules to limit his activity for the profit of the activity of others. The law considers this faculty of moral order in man, which we call reason, which, so to speak, has inspired him to create the law. It is for this reason that we classify the science of law among the so-called moral sciences.

But the law looks upon man not only as a moral being, but as a social being living in the midst of a social group. Now there are beside the law other manifestations of social life which may be studied scientifically. There is a science of religions, a science of morals, a science of intellectual products, political science, economic science, a science of human groups. Law is no exception. . . . The science of law is part of the group of sciences called social since they study social life under its different aspects. — May, *Introduction à l'étude du droit*, 2 ed., 53-54.

THE END OF LAW

VII

THEORIES OF JUSTICE

Miller, *The Data of Jurisprudence*, chap. 6; Salmond, *Jurisprudence*, § 9; Pulszky, *Theory of Law and Civil Society*, § 173; Bentham, *Theory of Legislation, Principles of the Civil Code*, part I, chaps. 1-7; Holland, *Jurisprudence*, chap. 6.

Kant, *Philosophy of Law* (Hastie's transl.), 45-46 (§ C); Spencer, *Justice*, chaps. 5, 6; Willoughby, *Social Justice*, chap. 2; Sidgwick, *The Methods of Ethics*, chap. 5; Paulsen, *Ethics* (Thilly's transl.), chap. 9; Gareis, *Vom Begriff Gerechtigkeit*; Demogue, *Notions fondamentales du droit privé*, 119-135; Picard, *Le droit pur*, liv. ix (le but de droit: la justice); Radbruch, *Grundzüge der Rechtsphilosophie*, 82-158; Binder, *Philosophie des Rechts*, § 12; Vacca, *Il diritto sperimentale*, 163-189; Pound, *Social Justice and Legal Justice*, 75 *Central Law Journal*, 455.

A

HISTORICAL: THE END OF LAW AS DEVELOPED IN LEGAL PRECEPTS AND DOCTRINES

Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 *Harvard Law Review*, 195.

See Leonhard's Review, translated in 28 *Harvard Law Rev.* 337-339.

1. PRIMITIVE LAW

Holmes, *The Common Law*, lect. 1; Hartland, *Primitive Law*.

Post, *Ethnologische Jurisprudenz*, II, bk. iv; Fehr, *Hammurapi und das Salisches Recht*, 135-138.

Vinogradoff, *Historical Jurisprudence*, I, 163-369.

Jenks, *Law and Politics in the Middle Ages*, chap. 4; Maine, *Ancient Law*, chap. 10; Strachan-Davidson, *Problems of the Roman Criminal Law*, chap. 3; Leist, *Graeco-Italische Rechtsgeschichte*, §§ 28-53; Amira, *Grundriss des Germanischen Rechts*, chaps. 4, 6.

Code of Hammurabi, §§ 196-214 (Harper's transl.); Laws of Manu, viii, 279-280 (Bühler's transl.); Twelve Tables of Gortyna, ii, 4-5, and ix (Roby's transl. in 2 *Law Quarterly Review*, 125); Law of Draco, quoted by Demosthenes against Aristocrates, § 96 — "If any one is killed violently, reprisals by seizing men (*τὰς ἀνδρὸς ἐφίας*) to be a right of his nearest relatives until justice is done for the murder or the murderers are surrendered. But this right of reprisal to extend to three men and no more"; Law of Draco, quoted by Plutarch, *Life of Solon*, — "He [Draco] likewise enacted a law for the reparation of damage received from beasts. A dog that had bit a man was to be delivered up bound to a log four cubits long"; Twelve Tables, viii, 2-3, 12-

13, xii, 2a (transl. in Goodwin, Twelve Tables, 13, 14); Gaius, iii, §§ 183-192, 222-223, iv, §§ 75-78 (transl. by Abdy and Walker, and by Poste); Salic Law, xiv, 1-3, xxx, 4-7, xl (transl. in Henderson, Historical Documents of the Middle Ages); Laws of Ethelbert, §§ 33-61 (transl. in Thorpe, Ancient Laws of England, I, 13-18); Laws of Alfred, § 24 (transl. in Thorpe, I, 79); Evans, Mediaeval Welsh Law (Laws of Howel the Good), 185-187; 190-191; Abdur Rahim, Muhammadan Jurisprudence, 358-359.

Dareste, *Le droit des représailles*, *Nouvelles études d'histoire du droit*, 38; Leist, *Altarisches Jus Gentium*, § 68; Maurer, *Altnordische Rechtsgeschichte*, V, pt. I; Maine, *Early History of Institutions*, lect. 2; Dareste, *Le prix du sang*, *Nouvelles études d'histoire du droit*, 1; Strachan-Davidson, *Problems of the Roman Criminal Law*, chap. 1; Wilda, *Strafrecht der Germanen*, 278-280; Jhering, *Geist des römischen Rechts*, 5 ed., I, §§ 18-18a; Danz, *Der sakrale Schutz im römischen Rechtsverkehr*, 47 ff.; Greenidge, *Infamia*, chaps. 3, 4; Thayer, *Preliminary Treatise on Evidence*, 9-10.

2. THE STRICT LAW

Jhering, *Geist des römischen Rechts*, 5 ed., §§ 44-47d.

Gaius, iii, § 168, iv, §§ 116-117; Heusler, *Institutionen des deutschen Privatrechts*, I, § 12; Justinian, *Institutes*, ii, 23 (transl. by Abdy and Walker and by Moyle); Doctor and Student, dial. II, chaps. 6, 7, 11, 24; Hargrave, *Law Tracts*, 324-325; Finch, *Law*, chap. 3; Coke, *Fourth Institute*, 82-84; Kerly, *History of Equity*, 113-115; Ames, *Specialty Contracts and Equitable Defenses*, 9 *Harvard Law Review*, 49.

Pollock, *Genius of the Common Law*, 36; Danz, *Lehrbuch der Geschichte des römischen Rechts*, II, § 142; Gray, *Restraints on the Alienation of Property*, § 74b; Coke on Littleton, 214b; Spence, *History of the Equitable Jurisdiction of the Court of Chancery*, I, 629, 654.

Aristotle, *Politics*, bk. ii, chap. 8 (Jowett's transl., vol. I, 47-49, Welldon's transl., 71-72); *Mirror of Justices*, chap. 5, §§ 1, 19; Letter of Thomas Jefferson to John Tyler, Tyler, *Letters and Times of the Tylers*, I, 35; Loyd, *Early Courts of Pennsylvania*, 162-163, 189-190, 193-195, 196-197, 209-210.

3. EQUITY: NATURAL LAW

Voigt, *Das Jus naturale, aequum et bonum und Jus Gentium der Römer*, I, 321-323.

Holland, *Jurisprudence*, 13 ed., 31-40; Markby, *Elements of Law*, 6 ed., §§ 116-124; Miller, *Data of Jurisprudence*, 381-387, 391-407; Salmond, *Jurisprudence*, § 13; Korkunov, *General Theory of Law* (transl. by Hastings), § 17; Pulszky, *Theory of Law and Civil Society*, § 220; Goadby, *Introduction to the Study of Law*, 2 ed., 127-134; Siegel, *Deutsche Rechtsgeschichte*, § 53; Maine, *Ancient Law*, chaps. 2, 3; Buckland, *Equity in Roman Law*; Maitland, *Equity*, lects. 1, 2; Erdmann, *History of Philosophy* (transl. by Hough), I, 190; Zeller, *Stoics, Epicureans and Sceptics* (transl. by Reichel), 287-290; references under *ius naturale*, ante, II, 1, (d), ii.

(i) Identification of Law with Morals.

Digest of Justinian, i, 1, 1, § 1 (transl. by Monro); *Id.*, i, 1, 11; *Institutes of Justinian*, ii, 7, 2; Code of Justinian, viii, 56, 1 and 10; *Id.*, iv, 44, 2; Planiol, *Traité élémentaire du droit civil*, III, § 2638; Grueber, *Introduction to Sohm, Institutes of Roman Law*, 1 ed., xxv; Russell, *International Law*, 19 *Rep. Am. Bar Ass'n*, 253-268; *Year Book*, 4 Hen. VII, 5; *Drew v. Hansen*,

6 Ves. 675, 678; *Lambe v. Eames*, L. R. 6 Ch. App. 597; Story, *Equity Jurisprudence*, I, § 247; Maitland, *Equity*, 104.

Pound, *The Decadence of Equity*, 5 *Columbia Law Review*, 20.

(ii) Human beings as subjects of legal rights.

Institutes of Justinian, i, 3, § 2, 8, §§ 1, 2; *Digest*, i, 5, 17 (transl. by Monro); Salkowski, *Institutes of Roman Law* (transl. by Whitfield), 160, 162, 248–253, 280–285; *Gaius*, i, §§ 144–145; Grotius, bk. ii, chap. 5, §§ 1–7; Maine, *International Law*, American ed., 126–127.

(iii) Substance rather than form.

Digest of Justinian, iv, 5, 2, § 1 (transl. by Monro); *Gaius*, i, § 158, ii §§ 40–41, 101–104, 115–117, 119, iv, § 36; Muirhead, *Historical Introduction to the Private Law of Rome*, 3 ed., 216; Phelps, *Juridical Equity*, §§ 194–204.

(iv) Good faith.

Gaius, iv, §§ 61–62; Muirhead, *Historical Introduction to the Private Law of Rome*, 3 ed., 256–257; Sohm, *Institutes of Roman Law* (transl. by Ledlie, 3 ed.), 101–103; *Gaius*, ii, § 43; Sohm, *Institutes of Roman Law* (transl. by Ledlie, 3 ed.), 210–211; *Digest of Justinian*, xxii, 1, 25, § 1, xli, 1, 40, xli, 1, 48, pr. and § 1; *Code of Justinian*, iii, 32, 22; *Digest of Justinian*, xli, 3, 4, § 20; *Gaius*, ii, § 43; *Digest*, i, 17, 84, § 1; *Sext.* i, 18; Grotius, bk. iii, chap. 11, §§ 3–4 (transl. by Whewell); Pufendorf, *Law of Nature and Nations* (Kennet's transl.), bk. iii, chap. 4; Burlamaqui, *Principles of Natural and Politic Law* (Nugent's transl.), bk. ii, pt. 4, chap. 10, § 4, bk. i, pt. 1, chap. 7; Maine, *Ancient Law*, chap. 9; Ames, *Law and Morals*, 22 *Harvard Law Review*, 97, 106.

(v) Unjust enrichment.

Digest, i, 17, 206, xii, 6, 1, xii, 6, 66; *Moses v. Macferlan*, 2 Burr. 1005; Ames, *Law and Morals*, 22 *Harvard Law Review*, 97, 106.

4. THE MATURITY OF LAW

Progress of Continental Law in the Nineteenth Century, *Continental Legal History Series*, vol. XI, chaps. 1, 2 (Alvarez).

(i) Equality.

Digest, i, 1, 4; Bentham, *Theory of Legislation*, *Principles of the Civil Code*, pt. I, chap. 2; Clark, *Practical Jurisprudence*, 110–114; Austin, *Jurisprudence*, 3 ed., 97–98; Stephen, *Liberty, Equality, Fraternity*, 189–255; Maine, *Early History of Institutions*, American ed., 398–400; Miller, *Data of Jurisprudence*, 379–381; Lorimer, *Institutes of Law*, 2 ed., 375–414; Röder, *Grundzüge des Naturrechts*, II, §§ 106–119; Lasson, *System der Rechtsphilosophie*, 376–377; Ritchie, *Natural Rights*, chap. 12; Demogue, *Notions fondamentales du droit privé*, 136–142.

(ii) Security.

Bentham, *Theory of Legislation*, *Principles of the Civil Code*, pt. I, chaps. 2, 7; Lorimer, *Institutes of Law*, 2 ed., 367–374; Gareis, *Science of Law* (transl. by Kocourek), 33; Demogue, *Notions fondamentales du droit privé*, 63–110; *Massachusetts Bill of Rights*, art. 10 (1780).

5. THE SOCIALIZATION OF LAW

Vinogradoff, *Historical Jurisprudence*, I, 157-159; Dicey, *Lectures on the Relation Between Law and Public Opinion in England*, 62-65.

Jhering, Scherz und Ernst in der Jurisprudenz (10 ed., 1909), 408-425; Charmont, *Le droit et l'esprit démocratique*, chap. 2; Stein, *Die soziale Frage im Lichte der Philosophie*, 2 ed., 457 ff.; Pound, *Social Justice and Legal Justice*, Proc. Mo. Bar Ass'n, 1912, 110, 75 *Central Law Journal*, 455; Duguit, *Les transformations générales du droit privé depuis le code Napoléon*, transl. in *Continental Legal History Series*, vol. XI, chap. 3; Barasch, *Le socialisme juridique et son influence sur l'évolution du droit civil en France à la fin du XIX^e siècle et au XX^e siècle* (1923).

(i) Limitations on the use of property: anti-social exercise of rights.

German Civil Code, § 226; Cosack, *Lehrbuch des deutschen bürgerlichen Rechts*, I, § 77; Planiol, *Traité élémentaire du droit civil* (9 ed.), II, §§ 870-872 *bis*; Walton, *Motive as an Element in Torts in the Common and in the Civil Law*, 22 *Harvard Law Review*, 501; Charmont, *L'Abus du droit*, *Revue trimestrielle de droit civil*, I, 113; Porcherot, *De l'abus du droit*; Salanson, *De l'abus du droit*; Huffcut, *Percolating Waters: The Rule of Reasonable User*, 13 *Yale Law Journal*, 222; Ames, *How Far an Act May be a Tort Because of the Wrongful Motive of the Actor*, 18 *Harvard Law Review*, 411, 414 ff.; Stoner, *The Influence of Social and Economic Ideals on the Law of Malicious Torts*, 8 *Michigan Law Review*, 468; Wigmore, *Cases on Torts*, II, app. A, §§ 262, 271-272; *Dunshee v. Standard Oil Co.*, 152 Ia. 618.

Village of Euclid v. Ambler Realty Co., 272 U. S. 365; *Windsor v. Whitney*, 95 Conn. 357; *State v. Houghton*, 144 Minn. 1; *Piper v. Ekern*, 180 Wis., 586. See Note by Professor T. P. Hardman, "The Social Interest in the Aesthetic and the Socialization of the Law," 29 W. Va. Law Quarterly, 195.

Jenks, *Governmental Action for Social Welfare*, 81; *Advertisement Regulations Act* [1907], VII Edw. 7, ch. 27; Terry, *Constitutionality of Statutes Forbidding Advertising Signs on Property*, 24 *Yale Law Journal*, 1; *Billboard and Other Forms of Outdoor Advertising*, *Chicago City Club Bulletin* V, no. 24; *St. Louis Advertisement Co. v. City*, 235 Mo. 99, 249 U. S. 269, 274, *People v. Oak Park*, 266 Ill. 365; *Bill Posting Co. v. Atlantic City*, 71 N. J. Law, 72; *Bryan v. City*, 212 Pa. St., 259.

(ii) Limitations on freedom of contract.

Wyman, *Public Service Corporations*, I, § 331; Dicey, *Law and Public Opinion in England*, lect. 8; Pound, *Liberty of Contract*, 18 *Yale Law Journal*, 454; Jastrow, *Was ist Arbeiterschutz*, *Archiv für Rechts- und Wirthschaftsphilosophie*, VI, 133, 317, 322, 501; Brown, *Underlying Principles of Modern Legislation*, 316-321; Isaacs, *The Standardizing of Contracts*, 27 *Yale Law Journal*, 34; Patterson, *Administrative Control of Insurance Policy Forms*, 25 *Columbia Law Rev.*, 253; Patterson, *The Insurance Commissioner in the United States*, 244-268.

Noble State Bank v. Haskell, 219 U. S. 104; *Chicago B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 566-575.

(iii) Limitations on the *ius disponendi*.

Gray, *Restraints on the Alienation of Property*, 2 ed., viii-ix; Thompson, *Homesteads and Exemptions*, § 465; *Massachusetts Acts of 1908*, chap. 605;

Illinois, Act of June 5, 1889, Laws of 1889, p. 208; New Zealand Family Protection Act, 1908; Allardice *v.* Allardice [1911], A. C. 730; Huber, System und Geschichte des Schweizerischen Privatrechts, III, §§ 82–83.

(iv) Limitations on the power of the creditor or injured party to exact satisfaction.

Thompson, Homesteads and Exemptions, §§ 40, 379; Bureau, Le Homestead; German Civil Code, §§ 528–529, 829; German Code of Civil Procedure (Zivilprozessordnung) § 850; Munch Petersen, Procedure from a Social Point of View, 5 North Carolina Law Rev., 322, 325.

Smith, Justice and the Poor, 56, 57; *In re Davis*, 103 Neb. 703

Compare Digest, xlii, 3, 4, pr.; Code, vii, 71, 1; Code, ii, 11, 11; Digest, xlii, 1, 16–17; Digest xlii, 1, 19, § 1; Digest, i, 17, 173; Roby, Roman Private Law, II, 129, note 1; Buckland, Text Book of Roman Law, 687–688; Baudry-Lacantinerie, Précis de droit civil, 12 ed., I, § 550.

(v) Liability without fault; responsibility for agencies employed.

Wambaugh, Workman's Compensation Acts, 25 Harvard Law Rev., 129; Arizona Workmen's Compensation Cases, 250 U. S. 400, 435, 436, 449; Opinion of the Justices, 209 Mass. 607; *State v. Clausen*, 65 Wash. 156; *Borgnis v. Falk*, 147 Wis. 327. See *Ives v. South Buffalo R. Co.*, 201 N. Y., 271.

Ballantine, A Compensation Plan for Railway Accident Claims, 29 Harvard Law Rev., 705; Marx, Compulsory Compensation Insurance, 25 Columbia Law Rev., 164.

Pilotage Act, 1913 (England), § 15.

Compare 1 Bishop, Criminal Law, §§ 285–291, with *Hobbs v. Winchester Corporation* [1910] 2 K. B. 471, 482 ff.; *United States v. Balint*, 258 U. S. 250; *State v. Keller*, 8 Idaho, 699; *State v. Turner*, 54 Ohio Law Bulletin, 409, 410.

(vi) Change of *res communes* and *res nullius* into *res publicae*.

See statutes in 1 Wiel, Water Rights, 3 ed., §§ 6, 170, 547; *Ex parte Bailey*, 155 Cal. 472; *Greer v. Connecticut*, 161 U. S. 519; *Missouri v. Holland*, 252 U. S. 416, 434; *Gallatin v. Corning, I. Co.*, 163 Cal. 405; *Greaves v. Dunlap*, 87 Wash. 648; Water Code of Washington (1913), §§ 1–2.

(vii) Interest of society in dependent members of the household.

Mack, The Juvenile Court, 23 Harvard Law Rev., 104; Flexner, Juvenile Courts and Probation, 9, 68; Eliot, The Juvenile Court, 89, 90. But see *McReynolds, J.*, in *Pierce v. Society of Sisters*, 268 U. S. 510, 535.

(viii) Tendency to hold that public funds should respond for injuries to individuals by public agencies.

Maguire, State Liability for Torts, 30 Harvard Law Rev., 20; Borchard, State Indemnity for Errors of Criminal Justice; Crane, Jurisdiction of the Court of Claims, 34 Harvard Law Rev. 161, 163–165, particularly 165 and citations; Borchard, Government Liability in Tort, 34 Yale Law Journ., 1, 129, 229, 36 Yale Law Journ., 1, 757, 1039. See *Fowler v. City of Cleveland*, 100 Ohio St. 158; *Aldrich v. City of Youngstown*, 106 Ohio St. 342.

B

PHILOSOPHICAL: THE END OF LAW AS DEVELOPED IN
JURISTIC THOUGHT

Pound, *The End of Law as Developed in Juristic Thought*, 27 *Harvard Law Review*, 605, 30 *Harvard Law Review*, 201.

1. GREEK

Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, §§ 13–16 (*World's Legal Philosophies*, 46–77).

Aristotle, *Nicomachean Ethics*, bk. v (convenient transl. by Browne, in Bohn's Libraries), bk. viii, 7, 2–4; Aristotle, *Politics*, i, 1, 9, i, 13, iii, 1, iii, 4–5, iv, 12 (convenient transl. by Welldon); Erdmann, *History of Philosophy* (transl. by Hough), I, 37, 52, 123, 190–191; Hildenbrand, *Geschichte und System der Rechts- und Staatsphilosophie*, §§ 1–121; Dunning, *Political Theories, Ancient and Mediaeval*, 28, 105; Zeller, *Aristotle and the Earlier Peripatetics* (transl. by Costelloe and Muirhead), II, 175, 197.

Shall we not then find that in such a city . . . a shoemaker is only a shoemaker, and not a pilot along with shoemaking, and that the husbandman is only a husbandman, and not a judge along with husbandry; and that the soldier is a soldier, and not a money-maker besides; and all others in the same way? He admitted it. And it would appear that if a man, who through wisdom were able to become everything and to imitate everything should come into our city and should wish to show us his poems, we should honor him . . . but we should tell him that there is no such person with us in our city, nor is there any such allowed to be, and we should send him to some other city. — Plato, *Republic*, iii, 397–398.

Justice is doing one's own business and not being a busy body. — Plato, *Republic*, ii, 368. Compare St. Paul in Eph. v, 22 ff., and vi, 1–5.

2. ROMAN

Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, §§ 17–20 (*World's Legal Philosophies*, 78–92).

Institutes of Justinian, i, 1, pr. and § 3; Cicero, *De Officiis*, ii, 12, *De Republica*, i, 32; Hildenbrand, *Geschichte und System der Rechts- und Staatsphilosophie*, §§ 131–135, 143–147; Voigt, *Das Ius Naturale, aequum et bonum und Ius Gentium der Römer*, I, §§ 16, 35–41, 44–64, 89–96; Savigny, *System des heutigen römischen Rechts*, I, 407–410.

3. MEDIAEVAL

Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, §§ 21–23 (*World's Legal Philosophies*, 93–111).

Thomas Aquinas, *Summa Theologica*, prima secundae, qu. 90–97, secunda secundae, qu. 57–80, 120, 122; Erdmann, *History of Philosophy* (transl. by Hough), I, 229; Dunning, *Political Theories, Ancient and Mediaeval*, 158, 196; Carlyle, *History of Mediaeval Political Theory*, III, 3–14.

4. THE REFORMATION

Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, § 24 (*World's Legal Philosophies*, 112–114).

Sources: Oldendorp, *Iuris naturalis gentium et ciuilis εισαγωγή* (1539); Hemmingius (Hemmingsen), *De lege naturale apodictica methodus* (1562); Winckler, *Principiorum iuris libri V* (1615). These may be found conveniently in Kaltenborn, *Die Vorläufer des Hugo Grotius*.

Hinrichs, *Geschichte der Rechts- und Staatsprincipien seit der Reformation*, I, 1–60; Gierke, *Johannes Althusius*, 2 ed., 18–49, 142–162, 321; Dunning, *Political Theories from Luther to Montesquieu*, chaps. 1–3.

5. THE SPANISH JURIST-THEOLOGIANS

Figgis, *Studies of Political Thought from Gerson to Grotius*, lect. VI.

Sources: Soto, *De iustitia et iure* (1589); Suarez, *De legibus ac deo legislatore* (1619).

Suarez, *De legibus*, iii, 9, § 4, iii, 11, iii, 35, § 8; Soto, *De iustitia et iure* iii, q. 3, art. 2; Franciscus de Victoria, *Relectiones theologicae* (1557), I, 354, 375.

Dunning, *Political Theories from Luther to Montesquieu*, 132–149; Westlake, *Chapters on the Principles of International Law*, 25–28.

6. THE SEVENTEENTH CENTURY

Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, §§ 25–27 (*World's Legal Philosophies*, 115–134).

Sources: Grotius, *De iure belli ac pacis* (1625); Hobbes, *Leviathan* (1651); Pufendorf, *De iure naturae et gentium* (1672).

Grotius, i, 1, 3–6, 8–11, ii, 1, 1, ii, 1, 11, ii, 10, 1, ii, 17, 2, § 1; Pufendorf, *De iure naturae et gentium*, i, chap. 7, §§ 6–17, iv, 4; Hobbes, *Leviathan*, chap. 15; Rutherford, *Institutes of Natural Law*, I, 2, § 3.

Stintzing, *Geschichte der deutschen Rechtswissenschaft*, II, 1–111; Hinrichs, *Geschichte der Rechts- und Staatsprincipien seit der Reformation*, I, 60–274, II, III, 1–318; Dunning, *Political Theories from Luther to Montesquieu*, 164–171, 318–325; Duff, *Spinoza's Political and Ethical Philosophy*, chap. 22.

That is unjust which is contrary to the nature of rational creatures. — Grotius, i, 1, 3, § 1.

From that law of nature by which we are obliged to transfer to another such rights as being retained hinder the peace of mankind, there followeth a third, which is this: “that men perform their covenants made;” without which covenants are in vain and but empty words, and the right of all men to all things remaining, we are still in a condition of war. And in this law of nature consisteth the fountain and original of justice. For where no covenant hath preceded, there hath no right been transferred and every man has

right to everything, and consequently no action can be unjust. But when a covenant is made, then to break it is unjust; and the definition of injustice is no other than the not performance of covenant. And whatsoever is not unjust is just. . . . And therefore where there is no "own," that is no property, there is no injustice; and where there is no coercive power erected, that is where there is no commonwealth, there is no property, all men having right to all things; therefore where there is no commonwealth, there nothing is unjust. So that the nature of justice consists in keeping of valid covenants; but the validity of covenants begins not but with the constitution of a civil power sufficient to compel men to keep them; and then it is also that property begins. — Hobbes, *Leviathan*, chap. 15.

Again, in the state of nature no one is by common consent master of anything, nor is there anything in nature which can be said to belong to one man rather than another. Hence in the state of nature we can conceive no wish to render to every man his own or to deprive a man of that which belongs to him; in other words, there is nothing in the state of nature answering to justice and injustice. Such ideas are only possible in a social state, when it is decreed by common consent what belongs to one man and what to another. — Spinoza, *Ethics*, pt. iv, pr. 37, n. § 2 (Elwes' transl.).

7. THE EIGHTEENTH CENTURY

Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, § 29 (*World's Legal Philosophies*, 141–156); Korkunov, *General Theory of Law* (transl. by Hastings), § 7; Ritchie, *Natural Rights*, chap. 3; Charmont, *La renaissance du droit naturel*, 10–43.

Burlamaqui, *Principles of Natural and Politic Law* (Nugent's transl.), pt. i, chap. 5, § 10, and chap. 10, §§ 1–7; Rousseau, *Social Contract*, bk. ii, chap. 6 (transl. by Barrington and by Tozer); Montesquieu, *Spirit of Laws*, bk. i (Nugent's transl., ed. by Prichard, vol. I, 1–7); Vattel, *Law of Nations*, bk. i, chap. 2, §§ 15–17 (there are several English versions); 1 Blackstone, *Commentaries*, 38–43; Rutherforth, *Institutes of Natural Law*, bk. ii, chap. 5, §§ 1–3; Wolff, *Institutiones juris naturae et gentium*, §§ 74–102.

I shall close this chapter and this book with a remark which ought to serve as a basis for the whole social system; it is that instead of destroying natural equality, the fundamental pact, on the contrary, substitutes a moral and lawful equality for the physical inequality which nature imposed upon men, so that though unequal in strength or intellect, they all become equal by convention and legal right. — Rousseau, *Social Contract*, bk. i, chap. 9 (Tozer's transl.).

8. THE NINETEENTH CENTURY

(i) Metaphysical Jurists.

Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, §§ 35–36 (*World's Legal Philosophies*, 215–259); Korkunov, *General Theory of Law* (transl. by Hastings), 320–322; Gray, *Nature and Sources of the Law*, § 58.

Lasson, *System der Rechtsphilosophie*, §§ 24–25; Herkless, *Lectures on Jurisprudence*, chap. 4; Hegel, *Philosophy of Right* (Dyde's transl.), §§ 29–33.

Every action is right which in itself, or in the maxim on which it proceeds, is such that it can coexist along with the freedom of the will of each and all in action according to a universal law. — Kant, *Rechtslehre*, xxxv (Hastie's transl.).

I must in all cases recognize the free being outside of me as such, that is, must limit my liberty by the possibility of his liberty. — Fichte, *Grundlage des Naturrechts*, I, 49.

This is right: that existence generalized is existence of the free will. Accordingly, as a generalization, it is liberty as an idea. — Hegel, *Grundlinien der Philosophie des Rechts*, 61.

We may define right as a principle . . . governing the exercise of liberty in the relations of human life. — Ahrens, *Cours du Droit Naturel*, 8 ed., I, 107.

Right is the sum of those universal determinations of action through which it happens that the ethical whole and its parts may be preserved and further developed. — Trendelenburg, *Naturrecht*, § 46.

The fundamental Axiom which forms the basis of the whole system of Natural Justice I conceive to be, that one human being has *no* right to control for his own benefit the volition of another. — Phillipps, *Jurisprudence*, 80–81 (§ 1).

The ultimate object of positive law is identical with the proximate object of natural law — viz. liberty. But being realizable only by means of order, order is the proximate object of positive law. — Lorimer, *Institutes of Law*, 2 ed., 523.

Reduced to these terms, the difference between morality and right is a difference in degree and not of essence. Yet it is a very important difference, as it *reduces the power of coercion to what is absolutely necessary for the harmonious coexistence of the individual with the whole*. — Lioy, *Philosophy of Right* (transl. by Hastie), I, 121.

Fundamental principles of justice:

1. The first and highest fundamental principle of justice provides that every one hold every good which he has unhindered by the acts of any other.

2. That for every value transferred, one receive in return an equal value.

3. Every newly produced value belongs to the producer.

4. Every destroyed good is to be destroyed to the destroyer, and if the destroyed good is another's, the destroyer suffers a subtraction from his own good until the injured person is compensated for his injury by an equivalent value. — Lasson, *System der Rechtsphilosophie*, § 24.

Right . . . [is] the correspondence or harmony of the will of the individual with the universal will. — Herkless, *Lectures on Jurisprudence*, 69.

The moral principle which protects the right is the inviolability of the human person. . . . This is the fundamental axiom upon which every doctrine of law may be and ought to be established. — Boistel, *Cours de philosophie du droit*, I, 72.

(ii) English Utilitarians.

Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, § 28 (*World's Legal Philosophies*, 134–141); Markby, *Elements of Law*, §§ 51–59; Mill, *On Liberty*, chap. 4; Bentham, *Theory of Legislation*, *Principles of the Civil Code*, chaps. 1, 7; Dicey, *Law and Public Opinion in England*, lect. 6.

Bentham, *Principles of Morals and Legislation* (1780, reprinted by the Clarendon Press, 1879); Bentham, *Traité de législation* (ed. by Dumont, 1802, transl. as Bentham's *Theory of Legislation* by Hildreth, 10 ed., 1904); Bentham, *Principles of the Civil Code*, Works, I, 295–364; Mill, *On Liberty* (1859).

See Albee, *History of English Utilitarianism*; Stephen, *The English Utilitarians*; Solari, *L'idea individuale e l'idea sociale nel diritto privato*, §§ 31–36.

The ideas which underlie the Benthamite or individualistic scheme of reform may conveniently be summarized under three leading principles and two corollaries.

1. Legislation is a science. . . .

2. The right aim of legislation is the carrying out of the principle of utility, or, in other words, the proper end of every law is the promotion of the greatest happiness of the greatest number. . . .

3. Every person is in the main and as a general rule the best judge of his own happiness. Hence legislation should aim at a removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbors. . . .

From these three guiding principles of legislative utilitarianism, — the scientific character of sound legislation, the principle of utility, faith in *laissez faire*, — English individualists have in practice deduced the two corollaries, that the law ought to extend the

sphere and enforce the obligation of contract, and that, as regards the possession of political power, every man ought to count for one man and no man ought to count for more than one. — Dicey, *Law and Public Opinion in England*, 2 ed., 134–149.

(iii) The Historical School.

In virtue of freedom man is the subject of right and law. His freedom is the foundation of right and all real relations of right emanate from it. . . .

In thus founding right upon the possibility of an act of will, the essential principle of right is indicated as that of equality. Right implies the recognition of freedom as belonging equally to all men as subjects of the power of will. It receives its material and contents from the impulse of man to refer to himself what exists out of himself. The function of right, as manifested in law, is to apply the principle of equality to the relations which arise from the operation of this impulse. — Puchta, *Cursus der Institutionen*, I, § 4 (Hastie's transl.).

Law exists for the sake of liberty; it has its basis in this, that men are beings endowed with a disposition to free exertion of will. It exists to protect liberty in that it limits caprice. — Arndts, *Juristische Encyklopädie*, § 12.

Justice is thus the condition of social equilibrium, both with reference to the domain of the rule of the will of persons, that is with regard to the harmony of law and [individual] right, and with reference to the maintenance of the limits of action of different persons, or, in other words, to the mutual accommodation to each other of the several and distinct existing rights. — Pulszky, *Theory of Law and Civil Society*, § 173.

There is a guide which, when kept clearly and constantly in view, sufficiently informs us what we should aim to do by legislation and what should be left to other agencies. This is what I have so often insisted upon as the sole function both of law and legislation, namely, to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty to all others. Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgment of it demands an excuse, and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right, all else is wrong. To leave each man to work out in freedom his own happiness or misery, to stand or fall by the consequences of his own conduct, is the true method of human discipline. — Carter, *Law: Its Origin, Growth, and Function*, 337.

(iv) The Positivists.

Hence that which we have to express in a precise way is the liberty of each limited only by the like liberties of all. This we do by saying: — Every man is free to do that which he wills provided he infringes not the equal freedom of any other man. — Spencer, *Justice*, § 27.

Compare: Our theory reconciles the idea of liberty with those of superior power and superior interest; right, concrete and complete, at the same time ideal and real, becomes the maximum of liberty, equal for all individuals, which is compatible with the maximum of liberty, of force and of interest for the social organism. — Fouillée, *L'Idée moderne du droit* 6 ed., 394.

Courcelle-Seneuil's parallel:

<i>Ancient Ideal</i>	<i>Nineteenth-Century Ideal</i>
1. Property founded on conquest.	1. Property founded on labor and saving.
2. Absolute power founded on military force.	2. Empire of laws freely assented to by all.
3. Classification by privilege founded on tradition and the will of the government.	3. Classification founded on personal merit, tested by competition.
4. A stationary society, corrected from time to time by reversion to the ancient type.	4. A progressive society, constantly improving itself by labor and invention.
5. A society ruled by laws, under the supervision of a public authority invested with compulsory powers.	5. A society living by the free initiative of its citizens, regulated by the observance of the moral law.

See Courcelle-Seneuil, *Préparation à l'étude du droit*, 99, 396.

(v) Economic Realists.

Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, §§ 37–40 (*World's Legal Philosophies*, 260–307); Brown, *The Underlying Principles of Modern Legislation*, Prologue (*The Challenge of Anarchy*).

(a) ANARCHIST INDIVIDUALISM

Proudhon, *Qu'est-ce que la propriété?* (1840); Proudhon, *Idée générale de la révolution au dix-neuvième siècle* (1851); Proudhon, *De la justice dans la révolution et dans l'église* (1858); Stirner, *Der Einzige und sein Eigenthum* (1845, transl. as *The Ego and His Own*); Grave, *La société future*, 7 ed., 1895. See Basch, *L'individualisme anarchiste*: Max Stirner (1904).

Free association, liberty, which is confined to the maintaining of equality in the means of production and of equivalence in exchanges, is the only possible just and true form of society. Politics is the science of liberty; under whatever name it may be disguised, the government of man by man is oppression. The highest form of society is found in the union of order and anarchy. Proudhon, *Qu'est-ce que la propriété? Œuvres Complètes*, 1873 ed., I, 224.

(b) SOCIALIST INDIVIDUALISM

(See *post*, pp. 132–133.)

Socialism in all its forms leaves intact the individualistic ends, but resorts to collective action as a new method of attaining them. That socialism is through and through individualistic in tendency, with emotional fraternalism super-added, is the point I would especially emphasize. Adler, "The Conception of Social Welfare," Proceedings of the Conference on Legal and Social Philosophy, 1913, 9.

It is the function of the state to further the development of the human race to a state of freedom. . . . It is the education and evolution of the human race to a state of freedom. Lassalle, Arbeiterprogram (1863), Werke (ed. by Blum), I, 156.

9. THE SOCIAL-PHILOSOPHICAL AND RECENT SOCIOLOGICAL SCHOOLS

Berolzheimer, System der Rechts- und Wirthschaftsphilosophie, II, §§ 43–48, 52 (World's Legal Philosophies, 336–431, 466–477).

Stammler, Wesen des Rechts und der Rechtswissenschaft (in Systematische Rechtswissenschaft i–lix); Kohler, Lehrbuch der Rechtsphilosophie (1 ed.), 38–43 (Albrecht's transl. 58–65); Kohler, Rechtsphilosophie und Universalrechtsgeschichte (in Holtzendorff, Enzyklopädie der Rechtswissenschaft, 7 ed., vol. I), §§ 13–16, 33–34, 51; Ehrlich, Grundlinien der Soziologie des Rechts, chaps. 9, 10.

Take any demand, however slight, which any creature, however weak, may make. Ought it not for its own sole sake to be satisfied? If not, prove why not. The only possible kind of proof you could adduce would be the exhibition of another creature who should make a demand that ran the other way. . . . Any desire is imperative to the extent of its amount; it makes itself valid by the fact that it exists at all. Some desires, truly enough, are small desires; they are put forward by insignificant persons, and we customarily make light of the obligations which they bring. But the fact that such personal demands as these impose small obligations does not keep the largest obligations from being personal demands. . . . After all, in seeking for a universal principle, we inevitably are carried onward to the most universal principle — that *the essence of good is simply to satisfy demand*. . . . Since everything which is demanded is by that fact a good, must not the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all times *as many demands as we can*? That act must be the best act, accordingly, which makes for the *best whole*, in the sense of awakening the least sum of dissatisfactions. In the casuistic scale, therefore, those ideals must be written highest which *prevail at the*

least cost, or by whose realization the least number of other ideals are destroyed. . . . The course of history is nothing but the story of men's struggle from generation to generation to find the more inclusive order. Invent some manner of realizing your own ideals which will also satisfy the alien demands, — that and that only is the path of peace! . . . Though some one's ideals are unquestionably the worse off for each improvement, yet a vastly greater total number of them find shelter in our civilized society than in the older savage ways. . . . As our present laws and customs have fought and conquered other past ones, so they will in their turn be overthrown by any newly discovered order which will hush up the complaints that they still give rise to without producing others louder still. — James, *The Will to Believe*, 195–206.

Justice to the individual, then, must according to these principles consist in the rendering to him, so far as possible, all those services, and surrounding him with all those conditions, which he requires for his highest self, for the satisfaction of those desires which his truest judgment tells him are good. Conversely, opportunity for fulfilment of highest aims is all that may be justly claimed as a right. — Willoughby, *Social Justice*, 20–21.

The satisfaction of everyone's wants so far as they are not outweighed by others' wants. — Adapted from Ward, *Applied Sociology*, 22–24.

The old justice in the economic field consisted chiefly in securing to each individual his rights in property or contracts. The new justice must consider how it can secure for each individual a standard of living, and such a share in the values of civilization as shall make possible a full moral life. — Dewey and Tufts, *Ethics*, 496.

Justice . . . may be described as the effort to eliminate from our social conditions the effects of the inequalities of nature upon the happiness and advancement of man, and particularly to create an artificial environment which shall serve the individual as well as the race and tend to perpetuate noble types rather than those which are base. — Kelly, *Government or Human Evolution: Justice*, 360.

Fundamental principles of just law:

The principles of respect. — 1. The content of a person's will must not be subjected to the arbitrary will of another. 2. A rightful demand can only be maintained in the sense [i. e. in such manner, to such extent] that the person bound can still be "his own neighbor" [i. e. an end in himself, so as to make "just volition possible"].

The principles of participation. — 1. No person legally bound is to be excluded from the common interest arbitrarily. 2. A legally conferred power of disposition can only be exclusive in the sense that [i. e. so far as] the person excluded may still be “his own neighbor” [i. e. an end in himself]. — Stammler, *Lehre von dem richtigen Rechte*, 2 ed., 148, 150.

As to the phrase “his own neighbor,” see *Lehre von dem richtigen Rechte*, 2 ed., 194–196, Husik’s transl., 217–218.

THE NATURE OF LAW

VIII

THEORIES OF LAW

Pound, Theories of Law, 22 Yale Law Journ. 114.

The two ideas of law, illustrated by two sets of words:

Greek	τὸ δίκαιον	<i>nómos</i>
Latin	<i>iūs</i>	<i>lex</i>
German	<i>Recht</i>	<i>Gesetz</i>
French	<i>droit</i>	<i>loi</i>
Italian	<i>diritto</i>	<i>legge</i>
Spanish	<i>derecho</i>	<i>ley</i>

Compare English, law, *a* law.

1. GREEK DEFINITIONS

What the ruling part of the state enacts after considering what ought to be done, is called law. — Xenophon (B.C. c. 429–c. 356), *Memorabilia*, i, 2, § 43.

Law is a definite statement according to a common agreement of the state giving warning how everything ought to be done. — Anaximenes (B.C. c. 560–c. 500), quoted by Aristotle, *Rhetoric* to Alexander, i.

Law seeks to be the finding out of reality. — [?] Plato (B.C. 427–347), *Minos*, 315A.

The common law, going through all things, which is the same with Zeus who administers the whole universe. — Chrysippus (B.C. 287–209), quoted by Diogenes Laertius, vii, 88.

This is law, which all men ought to obey for many reasons, and chiefly because every law is both a discovery and a gift of God and a teaching of wise men and a setting right of wrongs, intended and not intended, but also a common agreement of the state, according to which every one in the state ought to live. — Demosthenes (B.C. 384–322), *Against Aristogeiton*, 774.

2. ROMAN DEFINITIONS

Law (*lex*) is the highest reason, implanted in nature, which commands what ought to be done and prohibits the contrary. — Cicero (B.C. 106–43), *De Legibus*, i, 6.

Law (*lex*) is the right reason of commanding and prohibiting. — Id., i, 5.

For law (*lex*) is nothing else than right reason derived from the gods commanding what is honorable and forbidding the contrary. — Id., Philippic. xi, 12.

Compare: A *lex* is a general command of the people or of the *plebs* upon question by a magistrate. — Capito (ob. A.D. 22), quoted by Aulus Gellius, x, 20, 2.

Moreover the laws (*iura*) of the Roman people consist of statutes (*leges*), enactments of the plebians (*plebiscita*), resolves of the senate (*senatus consulta*), enactments of the emperor, edicts of those who have authority to issue them, and the answers of those learned in the law (*responsa prudentium*). — Gaius, i, § 2.

When about to study law we ought first to know whence comes the word law (*ius*). Moreover it is called law (*ius*) from justice (*iustitia*), for, as Celsus [a jurist of the end of the first or beginning of the second century, A.D.] well defines it, law (*ius*) is the art of what is right and equitable. — Ulpian (third century, A.D.) in Digest, i, 1, 1, § 1.

3. THE EARLIER MIDDLE AGES

As to the use of *lex* to mean law in general in this period, see Savigny, Geschichte des römischen Rechts im Mittelalter, I, § 37 (Cathcart's transl., 115–121).

Fas is divine law (*lex*), *ius* is human law (*lex*). . . . *Lex* is a written enactment. *Mos* is usage approved by time or unwritten law (*lex*). . . . Moreover usage is a certain law (*ius*) instituted by observance which is held for enactment (*lex*) when enacted law (*lex*) is wanting. — Isidore of Seville (ob. 636), Bruns, Fontes Iuris Romani Antiqui (6 ed.), II, 83.

Ius is the art of what is right and equitable. *Lex* is *ius* enacted by wise princes. — Petri Exceptiones Legum Romanorum, app. I; Fitting, Juristische Schriften des früheren Mittelalters, 164 (11th century).

Ius is the general term, so called because just; *lex* moreover is a species of *ius* and is so called from *legere* (to read) because it is written. Now all *ius* consists of *leges* and customs. *Lex* is an enactment of princes written down for the common good; custom is ancient usage derived from conduct (*moribus*), or unwritten *lex*. — Libellus de Uerbis Legalibus, 1, appended to the foregoing; Fitting, 181.

4. DEVELOPMENT OF THE CONCEPTION AND DEFINITION OF LAW FROM THE REVIVAL OF LEGAL STUDY AT BOLOGNA (TWELFTH CENTURY) TO THE TIME OF GROTIUS (SEVENTEENTH CENTURY)

Corpus iuris civilis believed to be binding statute law, and hence *lex*.

Law made up of the *corpus iuris* as interpreted by jurists and contemporary enactment, on the one hand, and of customary law of various peoples on the other.

Ius is the genus and *lex* the species. All *ius* consists of enactments and customs. *Lex* is a written enactment. Custom is long usage. Usage is a certain kind of law (*lex*), instituted by observance, which is held for enactment (*lex*) when enacted law (*lex*) is wanting. — Gratian, cc. 2–5, dist. I (about 1150).

For the English laws (*leges*), although not written, may as it should seem, and that without any absurdity, be termed laws (since this itself is a law — that which pleases the prince has the force of law). . . . For if from the mere want of writing only they should not be considered as laws, then unquestionably writing would seem to confer more authority upon laws themselves than either the equity of the persons constituting or the reason of those framing them. — Glanvill, *De Legibus et Consuetudinibus Regni Angliae*, Preface, Beames' transl., xi (about 1189).

Theory of St. Thomas Aquinas (1225 or 1227–1274):

The old *ius naturale* divided into

lex aeterna (eternal law), the "reason of the divine wisdom, governing the whole universe."

lex naturalis (natural law), the law of human nature proceeding ultimately from God, but immediately from human reason, and governing the actions of men only.

Positive law a mere recognition of the *lex naturalis*, which is above all human authority.

See *Summa Theologica*, 1, 2, qq. 92–95, translated in Rickaby, Aquinas *Ethicus*, 274–288.

A law is a rule and measure of acts, whereby one is induced to act or is restrained from action. Now the rule and measure of human acts is reason: it being the part of reason to direct to the end, which is the first principle of conduct. Hence a law must be some function of reason. — Thomas Aquinas, *Summa Theologica*, 1, 2, q. 90, art. 1 (Rickaby's transl.).

A law is . . . an ordinance of reason for the general good, emanating from him who has the care of the community, and promulgated. — Id., 1, 2, q. 90, art. 4

Every law framed by man bears the character of a law exactly to that extent to which it is derived from the law of nature. But

if on any point it is in conflict with the law of nature, it at once ceases to be a law: it is a mere perversion of law. — Id., 1, 2, § 95, art. 2.

Law (*lex*) is a holy sanction, commanding what is right and prohibiting the contrary. — Fortescue, *De Laudibus Legum Angliae*, cap. 3 (about 1468).

As natural law was discoverable by reason, the obvious effect was to require all rules of positive law to be tested by reason. Hence: "The first is the law eternal. The second is the law of nature of reasonable creatures, the which, as I have heard say, is called by them that be learned in the law of England, the law of reason." — Doctor and Student (Temp. Henry VIII), Intr.

A law (*lex*) of nature is a rule of reason; wherefore a human law (*lex*) partakes of the reason of law (*lex*) in so far as it is derived from a law of nature. And if they disagree in anything, there is no law but a corruption of law. — R. Suarez, *Repetitiones*, 272–273 (1558).

The proper signification of *ius* is one, namely, when *ius* is used to mean an enactment directing on behalf of the government those things which are right. . . . From this signification other less proper meanings have sprung. — Donellus, *De iure civili*, I, 3, § 2 (1589).

Ius from *iussum*. And hence the word *ius*. For I agree with those who consider that we say *ius* from *iubere* so that *ius* is as if you should say *iussum*. . . . For all law (*ius*) commands as is expressed in the definition of *ius*. . . .

Some [he cites Alciatus] hold that *ius* is said by metathesis, so that *ius* is, as it were, *uis* with the letters reversed. This does not agree with the fact. — Id., I, 4, §§ 1–2.

5. DEVELOPMENT OF THE CONCEPTION AND DEFINITION FROM GROTIUS TO KANT (SEVENTEENTH AND EIGHTEENTH CENTURIES)

Grotius puts natural law on a rational instead of a theological basis.

Conring (1643) overturns the mediaeval notion of the statutory authority of the *corpus iuris*.

Thus natural law became once more *ius naturale*, the dictates of reason in view of the exigencies of human constitution and human society, no longer *lex naturalis*, the enactments of a supernatural legislator.

And positive law became the application of reason to the civil relations of men, of which the *corpus iuris* was an exponent only because and to the extent of its inherent reasonableness.

[After defining *ius* in the ethical sense, that which is right, and *ius* in the sense of a right.] There is also a third signification in which it means the same as *lex* when that word is used in its broadest sense, so that it is a rule of moral actions obliging to that which is right. — Grotius, *De iure belli ac pacis*, i, 1, 9, § 1 (1625).

Law (*la loi*) in general is human reason. — Montesquieu, *L'esprit des lois*, i, 3 (1748).

A rule to which men are obliged to make their moral actions conformable. — Rutherford, *Institutes of Natural Law*, I, 1, § 1 (1754).

In England following the period of legislative energy during the Commonwealth, Hobbes saw chiefly the imperative element.

Civil law is to every subject those rules which the commonwealth hath commanded him . . . to make use of for the distinction of right and wrong; that is to say of what is contrary and not contrary to the rule. — Hobbes, *Leviathan*, chap. 26 (1651).

With the rise of a national law on the Continent, *lex* begins to stand for the rules of the civil law in each state.

A law (*lex*) is an enactment by which a superior obliges one subject to him to direct his actions according to the command of the former. — Pufendorf, *Elementa iurisprudentiae universalis*, def. 13 (1672).

In the eighteenth century the effect of an age of absolute governments in reviving the conception of law as enactment becomes marked.

A rule prescribed by the sovereign of a society to his subjects. — Burlamaqui, *Principes de droit naturel*, I, 8, 2 (1747).

Law is the expression of the general will. — Rousseau, *Contrat Social*, ii, 6 (1762).

Blackstone attempted to combine the two ideas.

A rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong. — Blackstone, *Commentaries*, I, 44 (1765).

See Blackstone, I, 41, 43, 47, 123, 160-161; Finch, *Law*, bk. i, chap. 6 (1613).

6. FURTHER DEVELOPMENT FROM KANT TO JHERING

(1) *Metaphysical*.

The sum of the circumstances according to which the will of one may be reconciled with the will of another according to a common rule of freedom. — Kant, *Metaphysische Anfangsgründe der Rechtslehre*, 27 (1797).

Man stands in the midst of the external world, and the most important element in his environment is contact with those who are like him in their nature and destiny. If free beings are to co-exist in such a condition of contact, furthering rather than hindering each other in their development, invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity. The rules whereby such

boundaries are determined and through them this free opportunity is secured are the law. — Savigny, *System des heutigen römischen Rechts*, I, § 52 (1840).

The organic whole of the external conditions of life measured by reason. — Krause, *Abriss des Systemes der Philosophie des Rechtes*, 209 (1828).

The recognition of the just freedom which manifests itself in persons, in their exertions of will and in their influence upon objects. — Puchta, *Cursus der Institutionen*, I, § 6 (1841).

An aggregate of rules which determine the mutual relations of men living in a community. — Arndts, *Juristische Encyklopädie*, § 1 (1850).

The rule or standard governing as a whole the conditions for the orderly attainment of whatever is good, or assures good for the individual or society, so far as those conditions depend on voluntary action. — Ahrens, *Philosophische Einleitung*, in Holtzendorff, *Encyklopädie der Rechtswissenschaft* (1 ed., 1871). Transl. by Pollock.

The expression of the idea of right involved in the relation of two or more human beings. — Miller, *Philosophy of Law*, 9 (1884).

The aggregate of the rules which provide for the employment of the force of society to restrain those who infringe the liberty of others. — Acolas, *Introduction à l'étude du droit*, 2 (1885).

The sum of the conditions of social coexistence with regard to the activity of the community and of individuals. — Pulszky, *Theory of Law and Civil Society*, 312 (1888).

The sum of moral rules which grant to persons living in a community a certain power over the outside world. — (Ledlie's transl.) Sohm, *Institutes of Roman Law* (1 ed., 1889), § 7.

(2) *Eighteenth century and Neo-Rousseauist.*

Those rules of intercourse between men which are deduced from their rights and moral claims; the expression of the jural and moral relations of men to one another. — Woolsey, *International Law*, § 3 (1871).

The recognition of the law of nature by special enactments and its vindication in special circumstances and relations. — Lorimer, *Institutes of Law*, 9 (1880).

The aggregate of received principles of justice. — Smith, *Elements of Right and of the Law*, § 231 (1887).

The will of the state concerning the civic conduct of those under its authority. — Woodrow Wilson, *The State*, § 1415 (1898).

A rule agreed upon by the people regulating the rights and duties of persons. — Andrews, *American Law*, § 72 (1900).

Law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power. — Oppenheim, *International Law*, I, § 5 (1905).

(3) *Later Historical.*

The sum of the rules which fix the relations of men living in society, — or at least of the rules which are sanctioned by the society, — imposed upon the individual by a social constraint. — Brissaud, *Manuel d'histoire du droit Français*, 3 (1898).

The rule of conduct to which a society gives effect in respect to the behavior of its subjects toward others and toward itself and in respect to the forms of its activity. — Merkel in *Holtzendorff, Encyklopädie der Rechtswissenschaft* (5 ed., 1890), 5.

A rule expressing the relations of human conduct conceived as subject to realization by state force. — Wignore, *Cases on Torts*, II, app. A, § 3 (1911).

(4) *Analytical.*

(i) *French. Influence of the French Code*

The civil law is, therefore, a rule of conduct upon a subject of common interest prescribed to all citizens by their lawful sovereign. It is the solemn declaration of the legislative power, by which it commands, under certain penalties or subject to certain rewards, what each citizen ought to do or not to do or to permit for the common good of society. — Toullier, *Droit civil Français*, I, § 14 (1808).

A law (*loi*) is a rule established by the authority which, according to the political constitution, has the power of commanding, or prohibiting, or of permitting throughout the state. A law truly and properly so-called, therefore, . . . is a rule sanctioned by the public power, a rule civilly and juridically obligatory. Law (*droit*) is the result, or better, the aggregate or totality of these rules. — Demolombe, *Cours de Code Napoléon*, I, § 2 (1845).

Law (*loi*) . . . is a rule established by a superior will in order to direct human actions. . . . The law (*droit*) . . . sometimes the rules of law (*lois*) seen in their aggregate, or more often the general result of their dispositions. — Demante, *Cours analytique de code civil*, I, §§ 1–2 (1849).

What is law (*droit*)? It is the aggregate, or rather the resultant, of the dispositions of the laws (*lois*) to which man is subjected, with the power of following or of violating them. . . . Now these laws (*lois*) are rules of conduct established by a competent authority. — Marcadé, *Explication du Code Napoléon* (5 ed., 1859), I, § 1.

One may say with Portalis that law (*la loi*) is a solemn declaration of the will of the sovereign upon an object of common interest. — Laurent, *Principes du droit civil Français*, I, § 2 (1878).

Obligatory rules of conduct, general and permanent, established for men by the temporal sovereign. — Vareilles-Sommières, *Principes fondamentaux de droit*, 12 (1889).

Law (*droit*) is the aggregate of precepts or laws (*lois*) governing the conduct of man toward his fellows, the observance of which it is possible, and at the same time just and useful, to assure by way of external coercion. — Baudry-Lacantinerie, *Précis de droit civil* (10 ed., 1908), i, § 1.

The *ensemble* of the rules to which the external conduct of man in his relations with his fellows is subjected, and which, under the inspiration of the natural idea of justice, in a given state of the collective consciousness of humanity, appearing susceptible of a social sanction where coercion is required, are or tend to be provided with such a sanction and thenceforth take the form of categorical injunctions governing particular wills for the purpose of assuring order in society. — Geny, *Science et technique en droit privé positif*, I, 51 (1914).

The *ensemble* of precepts, rules, or laws which govern human activity in society, the observance whereof is sanctioned in case of need by social constraint, otherwise called public force. — Colin et Capitant, *Droit civil Français*, I, 1 (1914).

(ii) *Anglo-American*

First Stage. — The imperative theory perfected; eighteenth-century ideas eliminated.

Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government* in independent nations or independent political societies. The aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied. — Austin, *The Province of Jurisprudence Determined*, 2 (1832).

A command proceeding from the supreme political authority of a state and addressed to the persons who are the subjects of that authority. — Amos, *Science of Law*, 48 (1874).

The general body of rules which are addressed by the rulers of the political society to the members of that society, and which are generally obeyed. — Markby, *Elements of Law*, § 9 (1871).

A law is a command; that is to say it is the signification by a lawgiver to a person obnoxious to evil of the lawgiver's wish that such person should do or forbear to do some act, with an intimation of an evil that will be inflicted in case the wish be disregarded. — Poste, *Gaius*, 2 (1871).

Second Stage. — Influence of the Historical School: Enforcement substituted for enactment.

A general rule of external human action enforced by a sovereign political authority. — Holland, *Jurisprudence*, chap. 3 (1880).

Rules of conduct defined by the state as those which it will enforce, for the enforcement of which it employs a uniform constraint. — Anson, *Law and Custom of the Constitution*, I, 8 (1886).

The sum of the rules of justice administered in a state and by its authority. — Pollock, *First Book of Jurisprudence*, 17 (1896).

The aggregate of rules administered mediately or immediately by the state's supreme authority, or regulating the constitution and functions of that supreme authority itself; the ultimate sanction being in both cases disapproval by the bulk of the members of that state. — Clark, *Practical Jurisprudence*, 172 (1883).

Third Stage. — Enforcement by tribunals substituted for enforcement by the sovereign.

The Law of every country . . . consists of all the principles, rules, or maxims enforced by the courts of that country as being supported by the authority of the state. — Dicey, *Private International Law as a Branch of the Law of England*, 6 *Law Quart. Rev.* 3 (1890).

The law or laws of a society are the rules in accordance with which the courts of that society determine cases, and by which, therefore, the members of that society are to govern themselves; and the circumstance which distinguishes these rules from other rules for conduct, and which makes them the law, is the fact that courts do act upon them. — Gray, *Definitions and Questions in Jurisprudence*, 6 *Harvard Law Rev.*, 24 (1892).

The sum of the rules administered by courts of justice. — Pollock and Maitland, *History of English Law*, Introduction (1895).

The rules recognized and acted on in courts of justice. — Salmond, *Jurisprudence*, § 5 (1902).

The rules and principles recognized and applied by the state's authorities, judicative and executive. — Clark, *Roman Private Law: Jurisprudence*, I, 75 (1914).

7. GERMAN DEFINITIONS SINCE JHERING. INFLUENCE OF GERMAN LEGISLATION

The sum of the rules of constraint which obtain in a state. — Jhering, *Der Zweck im Recht*, I, 320 (1877).

The rule armed with force first gives us the conception of law. That which does not possess the guarantee lying in force cannot be called law. — Lasson, *System der Rechtsphilosophie*, 207 (1882).

Law is a peaceable ordering (*Friedensordnung*) of the external relations of men and their communities to each other. It is an ordering (*norma agendi*), a regulating through the setting up of commands and prohibitions. — Gareis, *Encyklopädie der Rechtswissenschaft*, § 5 (1887).

The purpose of all law is a determinate external behavior of men toward men. The means of attaining this purpose, wherein alone the law consists, are norms or imperatives. — Bierling, *Juristische Prinzipienlehre*, I, § 3 (1894).

The legal order is an adjustment through coercion of the relations of human life arising in a social manner from the social nature of man. — Kohler, *Einführung in die Rechtswissenschaft*, § 1 (1902).

Law is the ordering of the relations of life guaranteed by the general will. — Dernburg, *Das bürgerliches Recht des deutschen Reichs und Preussens*, I, § 16 (1903).

Law is the ordering (*Ordnung*) based upon autonomous government in a state of civilization. — Berolzheimer, *System der Rechts- und Wirtschaftsphilosophie*, III, § 17 (1906).

8. RECENT DEFINITIONS FROM PRESENT-DAY STANDPOINTS

Pound, *Progress of the Law — Analytical Jurisprudence*, 1914-1927, 41 *Harvard Law Rev.* 174.

i. *Philosophical*

In the present, with its political storms which have shaken the consciousness-of-right of men and of peoples, in a time of confusion which looks upon law sometimes as sheer force, sometimes only as ideal powerlessness, we must call mankind back to a consciousness that law is neither the one nor the other, but rather might in the service of the idea of society, external coercion as the basis of freedom, form of the national community life, in which alone the individual may be free and may strive to fulfill in his person the idea of humanity. — Binder, *Philosophie des Rechts*, 1063 (1925).

ii. *Normative-Analytical*

The norms of a customarily followed, comprehensive, and permanent supreme power. — Somló, *Juristische Grundlehre*, 105 (1917).

Law is the legitimate order given to a human subject, individual or collective, bound to execute to the profit of another subject (entitled to claim from him the execution thereof) that an external fact be followed by another external fact, in default thereof by a third, and so on, with prescribed application of physical constraint to certain links in this chain. — Roguin, *La science juridique pure*, I, 122 (1923).

The delimitation of what men and groups of men are at liberty to do or not to do without incurring a condemnation, an execution, or some particular putting in play of force. — Lévy-Ullmann, *La définition du droit*, 165 (1917).

Legislation and custom . . . rest upon the constitution, which in the sense of legal logic is the ultimate norm, the final source of the system of law. The decisive element for the positivity of law which gives law the character of a self-sufficient system, distinct from all other systems of norms, independent, and closed within itself, lies in this norm [i. e., the constitution] as the highest, derivable from nothing beyond, through the quality of sovereignty lent by this ultimate norm to the whole system of law raised out of it. — Kelsen, *Das Problem der Souveränität*, 94 (1920).

iii. *Sociological*

The limitations imposed upon the free activity of each in the interest of the general peace are expressed in the form of rules of conduct which every man ought to observe in his relations with his fellows. These rules, these precepts to be observed by men in their relations with each other, constitute the law. — May, *Introduction à la science du droit*, 2 ed., 5 (1925).

A system of canons of valuation of social relations. — Perassi, *Introduzione alle scienze giuridiche*, 23 (1922).

A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged. — Cardozo, *The Growth of the Law*, 52 (1924).

IX

THE NATURE OF LAW

Austin, *Jurisprudence, Analysis of Lects.* 1-6 (4 ed., 81-87), lect. 1; Hobbes, *Leviathan*, pt. II, chap. 26, par. 6; Holland, *Jurisprudence*, chaps. 2, 3; Markby, *Elements of Law*, §§ 1-26; Pollock, *First Book of Jurisprudence*, chap. 1; Salmond, *Jurisprudence*, §§ 5, 16, 17; Brown, *The Austinian Theory of Law*, §§ 552-639; Clark, *Roman Private Law: Jurisprudence*, I, § 2.

Clark, *Practical Jurisprudence*, pt. I, chaps. 7, 11-16; Clark, *Roman Private Law: Jurisprudence*, I, § 5; Maine, *Early History of Institutions*, lect. 13; Carter, *Law: Its Origin, Growth, and Function*, lects. 1-8.

Jenks, *Law and Politics in the Middle Ages*, 1-6; Rattigan, *Science of Jurisprudence*, §§ 8-11a; Wigmore, *Problems of Law*, 5-10.

Miller, *Data of Jurisprudence*, chaps. 4, 5; Miller, *Lectures on the Philosophy of Law*, appendix A; Lorimer, *Institutes of Law*, 255-259; Korkunov, *General Theory of Law* (transl. by Hastings), 40-165.

Gray, *Nature and Sources of the Law*, 1 ed., §§ 191-247; Gareis, *Science of Law* (transl. by Kocourek), § 5; Dicey, *Law and Public Opinion in England*, 2 ed., 483-494; Cardozo, *The Growth of the Law*, 21-55.

Binding, *Die Normen und ihre Uebertretung*, 2 ed., I, §§ 5-20; Thon, *Rechtsnorm und subjektives Recht*, 1-11; Bierling, *Juristische Principienlehre*, I, § 3; Jellinek, *Allgemeine Staatslehre*, 3 ed., 332-337; Geny, *Science et technique en droit privé positif*, I, § 22; Lévy-Ullmann, *La définition du droit*; Roguin, *La science juridique pure*, I, 118-130; Kelsen, *Das Problem der Souveränität*, 85-101. See also Kelsen, *Aperçu d'une théorie générale de l'état*, *Revue de droit public*, XLIII, 562, 571-578 (1926); Voegelin, *Kelsen's Pure Theory of Law*, *Political Science Quarterly*, XLII, 268.

Duguit, *Objective Law*, 20 *Columbia Law Rev.*, 817, 21 *Id.* 17, 126, 142; Duguit, *Le droit positif et la loi positive*, 502-612.

May, *Introduction à la science du droit*, 2 ed., 3-9.

1. Analytical.

Austin's Analysis:

- (1) Commands set by a sovereign to subjects.
- (2) Rules set by a determinate authority.
- (3) Rules of general application.
- (4) Rules dealing with external human action.
- (5) Sanction.

Modification by later analytical jurists:

Law is that which is *enforced* by the state or by its judicial organs, not what is *set* by the state.

Recent German analysis.

Law is a body of norms established or recognized by the state in the administration of justice.

Suggested analysis.

- (1) Legal precepts.
 - (a) Rules.
 - (b) Principles.
 - (c) Conceptions.
 - (d) Standards.

- (2) A traditional art of decision and technique of using and developing legal materials.
- (3) Received ideals as to the end of law and what legal precepts should be and should achieve in view thereof.

See Pound, *Juristic Science and Law*, 31 *Harvard Law Rev.*, 1047, 1060-1063; Pound, *Theory of Judicial Decision*, 36 *Harvard Law Rev.*, 641, 643-653; Pound, *The Administrative Application of Legal Standards*, 44 *Rep. American Bar Ass'n* (1919), 443, 454-458; Al-Sanhoury, *Les restrictions contractuelles à la liberté individuelle de travail dans la jurisprudence Anglaise*, 23-75; Hauriou, *Police juridique et fond du droit*; Pound, *Introduction to The Supreme Court and Minimum Wage Legislation*, compiled by the National Consumers' League (1925); Cardozo, *The Growth of the Law*, 31-39.

As to standards, see *Mutual Film Co. v. Industrial Commission*, 236 U. S. 230, 245-246; Drake, *The Rule, the Principle, the Standard in Fluctuating Exchange*, 25 *Michigan Law Rev.*, 860.

Characteristics of law in a developed system:

- (1) Generality.
- (2) Universality.
- (3) Predictability.

The body of precepts in accordance with which justice is administered by the authority of the state.

See Cardozo, *The Growth of the Law*, 36-55.

2. Historical.

Results of philological investigation.

Results of legal history.

Primitive law (1) has no imperative element, or, at least that element is not well differentiated.

(2) is not set by a determinate authority.

(3) has no sanction, or, at least, sanction is feebly developed.

(4) is recognized rather than enforced.

Historical view of sanction:

The habit of obedience (Maine, *International Law*, 50-52).

The displeasure of one's fellow men (Clark, *Practical Jurisprudence*, bk. 1, chap. 16).

Public sentiment and opinion (see Lightwood, *The Nature of Positive Law*, 362, 389).

The social standard of justice (Carter, *The Ideal and Actual in Law*, 13 *Rep. Am. Bar Ass'n*, 217, 224-225).

Hartland, *Primitive Law*, chap. 6; Vinogradoff, *Historical Jurisprudence*, I, 353-361.

3. Philosophical.

Law as an expression of ideas of right.

Law as a securing of interests.

Law as a delimitation of interests.

The "jural postulates" of civilization.

Philosophical jurists regard the sources of law rather than the nature of law; they consider the ideal element rather than the precept element.

4. Sociological.

The functional view of law — law as a social mechanism.

The legal order a phase of social control.

Emge, Ueber den Charakter der Geltungsproblem in der Rechtswissenschaft, *Archiv für Rechts- und Wirtschaftsphilosophie*, XIV, 146, 277, XV, 54; Levi, *Contributi ad una teoria filosofica dell'ordine giuridico*, §§ 21–25; Perassi, *Introduzione alle scienze giuridiche*, chap. 1.

The body of precepts and received ideals, and the technique of using them, established or recognized by organized human society for the delimitation and securing of interests.

5. Bodies or types of precepts with reference to which theories of the nature of law must be tried.

(1) "Municipal" (civil) private law.

(2) Public law.

(a) Constitutional law.

(b) Administrative law.

See Dicey, *Law of the Constitution*, 8 ed., 1–34, 324–401, 413–434; Frankfurter, *The Task of Administrative Law*, 75 *University of Pennsylvania Law Rev.* 614 (also, as General Introduction, in Patterson, *The Insurance Commissioner in the United States*, xi–xviii); Berthélemy, *Traité élémentaire de droit administratif*, 11 ed., 1–9; Hauriou, *Précis de droit administratif*, 10 ed., 1–12; Jèze, *Les principes généraux de droit administratif*, 3 ed., I, 1–2.

(3) International law.

See Austin, *Jurisprudence*, 4 ed., 177; Holland, *Jurisprudence*, 13 ed., 133–135; Savigny, *System des heutigen römischen Rechts*, I, § 11; Zorn, *Völkerrecht*, 2 ed., § 2.

Maine, *International Law*, 47–53; Hall, *International Law*, Introductory chapter; Westlake, *International Law*, I, 5–13.

Liszt, *Völkerrecht*, 10 ed., 8–10; Mérignhac, *Droit public international*, I, 18–26; Bonfils, *Droit international public*, 7 ed., §§ 26–31; Hyde, *International Law*, I, 1–13. Triepel, *Völkerrecht und Landesrecht*, 1–10 (French translation, "*Droit international et droit interne*," 1–10); Wenzel, *Der Begriff des Gesetzes*, 344–468.

What have these in common?

How far are some of these to be called "law"?

6. Analogous uses of the term "law."

Laws of nature or of science.

Laws of grammar, etc.

Laws of morals, fashion, etc.

Laws of games.

See Carter, *The Ideal and the Actual in the Law*, 13 Rep. Am. Bar Ass'n, 217, 225-227.

Analogies to legislation in rules governing modern games.

X

LAW AND MORALS — JURISPRUDENCE AND ETHICS

Pound, *Law and Morals*, 2 ed., contains full bibliography.

Austin, *Jurisprudence*, lect. 5; Bentham, *Theory of Legislation*, *Principles of Legislation*, chap. 12; Pollock, *First Book of Jurisprudence*, pt. I, chap. 2; Gray, *Nature and Sources of the Law*, 1 ed., §§ 642-657; Clark, *Roman Private Law: Jurisprudence*, I, § 3. Carter, *Law: Its Origin, Growth, and Function*, lect. 6; Amos, *Science of Law*, chap. 3; Green, *Principles of Political Obligation*, §§ 11-31; Korkunov, *General Theory of Law* (transl. by Hastings), §§ 5-7; Gareis, *Science of Law* (transl. by Kocourek), § 6; Lorimer, *Institutes of Law*, 2 ed., 353-367; Kohler, *Philosophy of Law* (transl. by Albrecht), 58-60; Del Vecchio, *The Formal Bases of Law* (transl. by Lisle), §§ 96-111; *Modern French Legal Philosophy* (*Modern Legal Philosophy Series*, vol. 7), §§ 190, 206-207.

Ames, *Law and Morals*, 22 *Harvard Law Rev.* 97; Rattigan, *Science of Jurisprudence*, §§ 4-4a; Dillon, *Laws and Jurisprudence of England and America*, 12-20; Woodrow Wilson, *The State*, §§ 1449-1456; Lightwood, *The Nature of Positive Law*, 362-368; Miraglia, *Comparative Legal Philosophy* (transl. by Lisle), §§ 119-127; Hegel, *Philosophy of Right* (transl. by Dyde), §§ 105-114; Miller, *Philosophy of Law*, lect. 13; Hastie, *Outlines of Jurisprudence*, 17-20.

Jhering, *Zweck im Recht*, II, 3 ed., 15-94, 135-351; Jellinek, *Die sozial-ethische Bedeutung von Recht, Unrecht und Strafe*, chap. 2; Stammler, *Theorie der Rechtswissenschaft*, 450-481; Binder, *Rechtsbegriff und Rechtsidee*, 214-229; Pagel, *Beiträge zur philosophischen Rechtslehre*, 60-81.

Kocourek, *Subjective and Objective Elements in Law*, 21 *Illinois Law Rev.* 689.

1. Historical View.

Law and morals have a common origin, but diverge in their development.

Four stages in the development of law in this respect may be noted:

- (1) The stage of custom identical with morals.
- (2) The stage of strict law — codified or crystallized custom which in time is outstripped by morals.
- (3) The stage of infusion of morals.
- (4) The stage of conscious law-making.

2. Philosophical View.

Older Views.

Natural law and positive law.

Practical results of this notion in legal history.

The theory can be held with safety only at a time when absolute theories of morals obtain.

Newer views:

Teleological (Jhering).

The ideals of an epoch (Stammler).

Evolutionary (Kohler).

Sociological.

See Cardozo, *The Nature of the Judicial Process*, lect. 3; Ehrlich, *Grundlegung der Soziologie des Rechts*, chap. 4; Kornfeld, *Soziale Machtverhältnisse*, § 16; Wurzel, *Das juristische Denken*, 62-66 (transl. in *Science of Legal Method*, 371-377).

3. Analytical view:

Contact of law and morals in

- (a) judicial law-making.
- (b) interpretation and application of law.
- (c) judicial discretion.

So far as a complete separation of judicial and legislative functions is possible, the distinction is —

Law is for the judge.

Morals are for the law-maker.

Distinction between law and morals in respect of application and subject-matter:

The latter looks to thought and feeling.

The former looks to acts.

Ethics aims at perfecting the individual character of men.

Law seeks only to regulate the relations of individuals with each other and with the state.

Moral principles must be applied with reference to circumstances and individuals.

Legal rules are typically of general and absolute application.

Law must act in gross, and so more or less in the rough.

Law does not necessarily approve what it does not condemn.

Resistance to law may be moral, but cannot be legal.

Developed law is and must be scientific.

XI

LAW AND THE STATE — JURISPRUDENCE
AND POLITICS

Austin, Jurisprudence, lect. 6; Salmond, Jurisprudence, §§ 59–69; Holland, Jurisprudence, chap. 4; Bryce, Studies in History and Jurisprudence, essay 10; Markby, Elements of Law, §§ 31–38; Maine, Early History of Institutions, lect. 12; Jenks, Law and Politics in the Middle Ages, 68–71; Gray, Nature and Sources of the Law, 1 ed., §§ 169–183; Korkunov, General Theory of Law (transl. by Hastings), §§ 43–48; Gareis, Science of Law (transl. by Kocourek), § 46; Pollock, First Book of Jurisprudence, 5 ed., 261–279; Clark, Roman Private Law: Jurisprudence, I, § 4; Duguit, The Law and the State, 31 Harvard Law Rev. 1.

Borchard, The Relation Between State and Law (reprint from Yale Law Journal, vol. 36, 1927).

Clark, Practical Jurisprudence, 157–176; Carter, Law: Its Origin, Growth, and Function, 187–190; Amos, Science of Law, 2 ed., 118–123; Hegel, Philosophy of Right (transl. by Dyde), §§ 257–360; Miller, Philosophy of Law, lect. 7; Kohler, Recht und Staat, in Handbuch der Politik, 2 ed., 120; Heller, Die Souveränität, 13–117.

Vinogradoff, Historical Jurisprudence, I, 84–99; Krabbe, The Modern Idea of the State (transl. by Sabine and Shepard), Translators' Introduction, Author's Introduction, chaps. 1–4, 9.

Kelsen, Hauptprobleme der Staatsrechtslehre, 2 ed., 97–188; Kelsen, Das Problem der Souveränität, chaps. 1–4; Kelsen, Aperçu d'une théorie générale de l'état, Revue de droit public, XLIII, 561 (1926).

1. The Legal Theory of the State.

The purpose is to set forth the legal theory of the state.

Not political theories of the state.

Not philosophical theories of the state.

The legal theory has reference to the immediate practical source of rules and sanctions.

Political theories have reference to the ultimate practical source of rules and sanctions.

Philosophical theories have reference to the ultimate moral source of rules and sanctions.

A state is a permanent political organization, supreme within and independent of *legal* control from without.

The state as a person.

For a full exposition and critique of theories of state and law from the beginning of the XIX century to the present, see Sander, Staat und Recht, 2 vols., 1922.

2. Anglo-American Theory of Sovereignty.

Dickinson, A Working Theory of Sovereignty, 42 Political Science Quarterly, 524.

The state is the whole of the political society in its corporate aspect.

The sovereign is that organ or that complex of organs which exercises its governmental functions.

"Consent of the governed" is a political, not a legal theory.

Sovereignty is the aggregate of powers possessed by the ruler or the ruling organs of a political society.

It may be:

(a) Internal — the sovereign is legally paramount over all action within.

(b) External — the sovereign is independent of all legal control from without.

Powers of internal sovereignty.

The separation of powers.

Aristotle, *Politics*, iv, 14 (Jowett's transl., I, 133; Welldon's transl., 292); Dickinson, *Administrative Justice and the Supremacy of the Law*, chap. 2; Goodnow, *Comparative Administrative Law*, I, chap. 3; Sidgwick, *Elements of Politics*, 363; Bondy, *The Separation of Governmental Powers*, *Columbia University Studies in History, Economics and Public Law*, V, No. 2 (p. 133); Fuzier-Hermann, *La séparation des pouvoirs*, 181 ff.; Hauriou, *Principes de droit public*, 2 ed., 692-700; Berthelémy, *Traité élémentaire de droit administratif*, 11 ed., 1-29; Esmein, *Éléments de droit constitutionnel*, 7 ed., 457-538; Duguit, *Traité de droit constitutionnel*, 2 ed., II, §§ 63-64; Jellinek, *Recht des modernen Staates*, 3 ed., 496-504, 595-624; Schmidt, *Allgemeine Staatslehre*, I, 209-217.

See Taft, C. J., *Eulogy of Chief Justice White*, 257 U. S. xxv; and compare *Intermountain Rate Cases*, 234 U. S. 476, with the opinions in the lower court, 191 Fed. 856.

The sovereign is incapable of legal limitation, but separate organs may be held to certain spheres or modes of action.

The mandate theory.

See Vattel, bk. i, chap. 3, § 4; Coxe, *Judicial Power and Unconstitutional Legislation*, 114-121; *Brown v. Leyds*, 14 Cape Law Journ. 94.

Legal and political sovereignty must be distinguished.

Sovereignty is a modern development.

3. Duguit's Theory of Sovereignty.

Duguit, *Les transformations du droit public*, chaps. 1, 2, and conclusion (Laski's transl., "Law and the Modern State," 1-67, 243-245); Duguit, *L'état, les gouvernants, et les agents*; Duguit, *The Concept of Public Service*, 32 *Yale Law Journ.* 425; Brown, *The Jurisprudence of M. Duguit*, 32 *Law Quarterly Rev.* 168; Laski, *The Problem of Sovereignty*, chap. 1; Jèze, *Cours de droit public*, liv. 2; Gavet, *Individualism and Realism*, 29 *Yale Law Journ.* 523; Kunz, *Die Rechts- und Staatslehre Léon Duguits*, *Revue internationale de la théorie du droit*, I, 140.

XII

JUSTICE ACCORDING TO LAW

Pound, *Justice According to Law*, 13 *Columbia Law Rev.* 696, 14 *Columbia Law Rev.* 1, 103.

Pollock, *First Book of Jurisprudence*, pt. I, chap. 2; Salmond, *Jurisprudence*, §§ 6, 7, 9, 10, 18–20, 26–29; Markby, *Elements of Law*, § 201; Amos, *Science of Law*, chap. 14; Korkunov, *General Theory of Law* (transl. by Hastings), §§ 41, 49; Demogue, *Les principes fondamentales du droit privé*, pt. I, chaps. 2–3.

1. The administration of justice — the legal order.

Regulative systems for maintaining right by external control:

- (a) Religion.
- (b) Public opinion.
- (c) Administration of justice by the state.

2. Justice without law.

Law is not theoretically essential to the administration of justice.

Examples of justice without law:

- In legal history.
- In modern states.

Salmond, *First Principles of Jurisprudence*, 89–90; Grotius, *De jure belli ac pacis* (Whewell's transl.), ii, 26, 1; Ahrens, *Cours de droit naturel*, 8 ed., I, 177; Lasson, *Rechtsphilosophie*, 238–239; Gareis, *Science of Law* (transl. by Kocourek), § 6; Pulszky, *Theory of Law and Civil Society*, § 174; Stammler, *Theorie der Rechtswissenschaft*, 134–136. See *Laws of Kansas*, 1913, chap. 170.

See also Simpson and Quinn, *Popular Justice*, *Archiv für Rechts- und Wirtschaftsphilosophie*, XIX, 433.

3. Justice according to law.

Law means uniformity of judicial and magisterial action, — generality, equality, and certainty in the administration of justice.

Advantages of law:

- (1) Law makes it possible to predict the course which the administration of justice will take.
- (2) Law secures against errors of individual judgment.
- (3) Law secures against improper motives on the part of those who administer justice.
- (4) Law provides the magistrate with standards in which the settled ethical ideas of the community are formulated.
- (5) Law gives the magistrate the benefit of all the experience of his predecessors.
- (6) Law prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty immediate interests.

Disadvantages of law:

- (1) Rules must be made for cases in gross and men in the mass and must operate impersonally and more or less arbitrarily.
- (2) Science and system carry with them a tendency to make law an end rather than a means.
- (3) Law begets more law, and a developed system tends to attempt rules where rules are not practicable and to invade the legitimate domain of justice without law.
- (4) As law formulates settled ethical ideas, it can not, in periods of transition, accord with the more advanced conceptions of the present; there is always an element, greater or less, that does not wholly correspond to present needs or to present conceptions of justice.

Salmond, *First Principles of Jurisprudence*, 90-92; Korkunov, *General Theory of Law* (transl. by Hastings), 326-327, 394-395; Pound, *Causes of Popular Dissatisfaction with the Administration of Justice*, *Rep. Am. Bar Ass'n*, XXIX, 395, 397-402.

4. Legislative justice.

Sidgwick, *Elements of Politics*, 355-356, 360, 482-484.

Examples of legislative justice:

- (1) Greek trials before popular assemblies.
See Vinogradoff, *Historical Jurisprudence*, II, 150-152.
- (2) Roman capital trials before the people and appeals to the people in criminal causes.
- (3) Germanic administration of justice by assemblies of free men.
- (4) Judicial power of the English parliament.
 - (a) Relief against duress and fraud.
See Rogers, *Protests of the Lords*, I, 17, 19, 22, 30, 39.
 - (b) Error and appeal in the House of Lords.
 - (c) Impeachments.
 - (d) Bills of attainder and of pains and penalties.
 - (e) Divorce bills.
- (5) Jurisdiction of the French senate to "pass judgment upon the President of the Republic and the ministers and to take cognizance of attacks upon the security of the state."
- (6) Judicial powers of American colonial legislatures and state legislatures immediately after the Revolution.
 - (a) Bills of attainder.
 - (b) Bills of pains and penalties.
 - (c) Appeal and error.
 - (d) Legislative granting of new trials.
See *Merrill v. Sherburne*, 1 N. H. 199, 216.
 - (e) Divorce.
 - (f) Insolvency.
- (7) Legislative justice in America today.
 - (a) Impeachment.
See Potts, *Impeachment as a Remedy*, 12 *St. Louis Law Rev.* 15, 31-38.
 - (b) Claims against the state.

Defects of legislative justice.

- (1) In practice legislative justice has proved unequal, uncertain, and capricious.
Wooddesson, Lectures, II, lect. 41; Tucker's Blackstone, I, 292-294; Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. Law Rev. 81, 147, 171; Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153.
- (2) The influence of personal solicitation, lobbying, and even corruption has been very marked.
Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153; *Pierce v. State*, 13 N. H. 536, 557; Debates of Pennsylvania Constitutional Convention (1873), III, 5-20.
- (3) Legislative justice has always proved highly susceptible to the influence of passion and prejudice.
Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. Law Rev. 147, 157, 162; Tucker's Blackstone, I, 293; Trial of Judge Addison, 7-15; Loyd, Early Courts of Pennsylvania, 143, 146; Trial of Andrew Johnson (Official ed.), I, 674, 693, 696-697, 698-700; Stephen, History of the Criminal Law, I, 160; Lovat-Fraser, The Impeachment of Lord Melville, 24 Juridical Rev. 235; Park, Biographical Sketch of Judge Emory Spear, 36 Rep. Georgia Bar Ass'n (1919), 101, 114-115.
- (4) Purely partisan or political motives have preponderated as grounds of decision.
See the last three citations next above; Atlay, Victorian Chancellors, I, 144-145; Campbell, Lives of the Lord Chancellors, VIII, 144-146; Browne, The New York Court of Appeals, 2 Green Bag, 277-278.
- (5) Legislators who have not heard all the evidence have habitually participated in argument and decision; and those who have not heard all the arguments have habitually taken part in the decision.
See the record of attendance and voting in the Impeachment of Cox (Minnesota, 1881).
On the psychology of legislative justice, see Ross, Social Psychology, 57; Le Bon, The Crowd, chap. 5; Sidis, Psychology of Suggestion, 299.

5. Executive justice.

Pound, Executive Justice, 55 Am. Law Reg. 137; Pound, The Revival of Personal Government, Proc. N. H. Bar Ass'n, 1917, 13; Goodnow, The Growth of Executive Discretion, Proc. Am. Pol. Sci. Ass'n, II, 29; Powell, Judicial Review of Administrative Action in Immigration Proceedings, 22 Harv. Law Rev. 360; McClintock, The Administrative Determination of Public Land Controversies, 9 Minnesota Law Rev. 420, 542, 638-656; Patterson, The Insurance Commissioner in the United States, chap. 1.

In legal history.

In the Anglo-American polity.

Law and Administration in nineteenth-century America.

The Reaction in America.

Boards of Health, etc.
 Public Utility Commissions.
 Boards of Engineers, etc.
 Industrial Commissions.
 Probation Commissions.
 Pure Food Commissions.
 Administrative powers in immigration.
 The Trade Commission.

As to the same movement in England, see *Local Government Board v Arlidge*, [1915] A. C. 120, [1914] 1 K. B. 160; Dicey, *Law and Opinion in England*, 2 ed., xli-xliv; Dicey, *Law of the Constitution*, 8 ed., xxxvii-xlvi.

Analogy in English law in the sixteenth century.

See Maitland, *English Law and the Renaissance*, 21 ff.

The balance between law and administration.

The advantages claimed for executive justice are those claimed for justice without law.

- (1) Directness.
- (2) Expedition.
- (3) Conformity to popular will for the time being.
- (4) Freedom from the bonds of purely traditional rules.
- (5) Freedom from technical rules of evidence and power to act upon the every-day instincts of ordinary men.

The defects of executive justice are those of justice without law.

Forms and rules, by compelling deliberation, guard against suggestion and impulse and insure the application of reason to the cause.

In time administrative tribunals have turned into ordinary courts.

6. Judicial justice.

Bluntschli, *Theory of the State*, 3 Oxford ed., 523; Lieber, *Civil Liberty and Self-Government*, chaps. 18, 19; Burgess, *Political Science and Constitutional Law*, II, 356-366; Baldwin, *The American Judiciary*, 1-98; Brown, *Judicial Independence*, Rep. Am. Bar Ass'n, XII, 265; Root, *Judicial Decisions and Public Feeling*, Addresses on Government and Citizenship, 445; Pound, *Social Problems and the Courts*, 18 Am. Journ. Sociol. 331.

Setting off of the judicial function has been a gradual process.

Objections urged against judicial justice:

- (1) That it is too rigid and does not allow sufficient play to the non-legal conscience in the ascertaining or in the applying of the law.
- (2) That the premises employed in judicial justice are too narrow and pedantic and the fundamental principles too fixed, so that judicial justice is too slow in responding to the environment in which it must operate.
- (3) That it is characterized by a tendency to reduce to rule, along with those things which demand rule, those with respect to which detailed rules are not practicable.

See Lord Shaw in *Local Government Board v. Arlidge*, [1915] A. C. 120, 137-138; Crownhart, *Labor Law Enforcement through Administrative Orders*, 4 *American Labor Legislation Rev.* 13.

These objections amount to this: That judicial justice realizes justice according to law most completely and so brings out its defects as well as its excellencies.

Advantages of judicial justice:

- (1) It combines the possibilities of certainty and of flexibility better than any other form of administering justice.
- (2) There are checks upon the judge which do not obtain or are ineffective in case of legislative and executive officers.
- (3) Because of training in and habit of seeking and applying principles when called on to act and because their decisions are subject to expert criticism, judges will stand for the law against excitement and clamor.

Rutgers v. Waddington, 1 *Thayer, Cas. Const. L.* 63; *Bayard v. Singleton*, 1 *Martin (N. C.)*, 42; *Brown v. Leyds*, 14 *Cape Law Journ.* 71, 84; *Littleton v. Fritz*, 65 *Ia.* 488; *Sims' Case*, 7 *Cush.* 285; *The Case of Thomas Sims*, 14 *Monthly Law Reporter*, 1; *The Removal of Judge Loring*, 18 *Monthly Law Reporter*, 1.

THE SCOPE AND SUBJECT MATTER OF LAW

XIII

INTERESTS

A. THEORY OF INTERESTS

Jhering, Law as a Means to an End (Husik's transl.), 28-35; Gray, Nature and Sources of the Law, 1 ed., §§ 48-50; Geny, Méthode d'interprétation, 2 ed., II, §§ 173-175; Cardozo, The Nature of the Judicial Process, 112-115; Pound, The Spirit of the Common Law, 91-93, 197-203, Introduction to the Philosophy of Law, 90-96, Interpretations of Legal History, 158-164.

An interest is a demand or desire which human beings either individually or in groups seek to satisfy, of which, therefore, the ordering of human relations in civilized society must take account.

The law does not create interests. It classifies them and recognizes a larger or smaller number; it defines the extent to which it will give effect to those which it recognizes, in view of (a) other interests, (b) the possibilities of effectively securing them through law; it devises means for securing them when recognized and within the determined limits.

Hence in determining the scope and subject-matter of a legal system we have (1) to take an inventory of the interests which press for recognition and generalize and classify them; (2) to determine the interests which the law should recognize and seek to secure; (3) to determine the principles upon which such interests should be defined and limited for the purpose of securing them; (4) to consider the means by which the law may secure them when recognized and delimited; and (5) to take account of the limitations upon effective legal action which may preclude complete recognition or complete securing of interests which otherwise we should seek to secure.

B. INVENTORY AND CLASSIFICATION OF INTERESTS

The interests which the legal order secures may be (1) demands or desires involved in or regarded from the standpoint of the individual life immediately as such (*individual interests*); (2) demands or desires involved in or looked at from the standpoint of

life in a politically organized society, asserted in title of political life (*public interests*); or (3) those wider demands or desires involved in or looked at from the standpoint of social life in civilized society and asserted in title of social life (*social interests*).

INTERESTS TO BE SECURED

Ritchie, *Natural Rights*; Spencer, *Justice*, chaps. 9–18; Paulsen, *Ethics* (Thilly's transl.), 633–637; Green, *Principles of Political Obligation*, §§ 30–31; Lorimer, *Institutes of Law*, chap. 7; Demogue, *Notions fondamentales du droit privé*, 405–443.

Ahrens, *Cours de droit naturel*, 8 ed., II, §§ 43–88; Hegel, *Philosophy of Right* (Dyde's transl.), §§ 34–104; Fichte, *Science of Rights* (Kroeger's transl.), 298–343, 391–469; Beaussire, *Les principes du droit*, bk. iii; Lasso, *System der Rechtsphilosophie*, §§ 48–56; Boistel, *Philosophie du droit*, I, §§ 96–241; Kohler, *Lehrbuch der Rechtsphilosophie*, 3 ed., 109–185.

1. *Individual*

Jethro Brown, *The Underlying Principles of Modern Legislation*, chaps. 7, 8.

Lioy, *Philosophy of Right* (Hastie's transl.), II, chap. 1. "The public good is in nothing more essentially interested than in the protection of every individual's private rights." — 1 Blackstone, *Commentaries*, 139. "Two fundamental tendencies, which are characteristic of English thinking with respect to the relation of the individual to the state and have found more marked expression in English law making than in any other, put their stamp upon Locke's philosophy of law and of the state: unlimited high valuing of individual liberty and respect for individual property." — Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, II, 160 (*The World's Legal Philosophies*, 137).

"Man *in abstracto*, as assumed by philosophies of law, has never actually existed at any point in time or space." — Wundt, *Ethics* (transl. by Titchener and others), III, 160.

(i) *Personality*

Pound, *Interests of Personality*, 28 *Harvard Law Rev.* 343, 445, *Selected Essays on the Law of Torts*, 87.

Gareis, *Science of Law* (Kocourek's transl.), §§ 122–135; Adler, *Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch* (in the *Festschrift zur Jahrhundertfeier des allgemeinen bürgerlichen Gesetzbuches*); Geyer, *Geschichte und System der Rechtsphilosophie*, 137–142; Stahl, *Philosophie des Rechts*, 5 ed., 312–350.

a. *The Physical Person*

Green, *Principles of Political Obligation*, §§ 148–156.

Miller, *Lectures on the Philosophy of Law*, lect. XI; Amos, *Systematic View of the Science of Jurisprudence*, 287–297; Post, *Ethnologische Jurisprudenz*, II, § 102; 1 Blackstone, *Commentaries*, 129–138.

b. *Honor — Reputation*

Dewey and Tufts, *Ethics*, 85–89; Westermarck, *Origin and Development of the Moral Ideas*, chap. 32; Post, *Ethnologische Jurisprudenz*, II, §§ 17, 103; Institutes of Justinian, iv, 4; Sohm, *Institutes of Roman Law* (Ledlie's transl.), 3 ed., § 36.

c. *Privacy and Sensibilities*

Warren and Brandeis, *The Right to Privacy*, 4 *Harvard Law Rev.* 193, *Selected Essays in the Law of Torts*, 122; Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 *Harvard Law Rev.* 640, 668–677; Baudry-Lacantinerie, *Précis de droit civil*, I, §§ 118–119; Scialoja, *Del diritto al nome* (1889); *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430.

See also Brunstein, *Namen und Firmenschutz in Oesterreich*, *Festgabe für Kohler*, 28, 38–42; Borchgrave, *Da la propriété des lettres confidentielles*, *Festgabe für Kohler*, 23; Misch, *Der strafrechtliche Schutz der Gefühle* (1911); *Satku v. Ibrahim*, 2 *Bombay*, 457.

d. *Belief and Opinion*

Pollock, *Essays in Jurisprudence and Ethics*, 144–175; Mill, *On Liberty*, chap. 2; Stephen, *Liberty, Equality, Fraternity*, chap. 2.

(ii) *Domestic relations*

Pound, *Individual Interests in the Domestic Relations*, 14 *Michigan Law Rev.* 177.

Holbrook, *The Change in the Meaning of Consortium*, 32 *Michigan Law Rev.* 1; Warren, *The Husband's Right to the Wife's Services*, 38 *Harvard Law Rev.* 421, 622.

Miller, *Philosophy of Law*, lect. 6; Lioy, *Philosophy of Right* (Hastie's transl.), II, chap. 2; Kohler, *Rechtsphilosophie und Universalrechtsgeschichte*, §§ 17–24; Kohler, *Lehrbuch der Rechtsphilosophie*, 66–81; Post, *Zur Entwicklungsgeschichte des Familienrechts*.

(iii) *Substance*

Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, vol. IV.

Kant, *Metaphysische Anfangsgründe der Rechtslehre*, §§ 1–21 (Hastie's transl., 62–107); Gareis, *Science of Law* (Kocourek's transl.), §§ 19–23; Schuppe, *Grundzüge der Ethik und Rechtsphilosophie*, §§ 87–96; Demogue, *Notions fondamentales du droit privé*, 383–404.

a. *Property*

Green, *Principles of Political Obligation*, §§ 211–231; Ely, *Property and Contract in their Relation to the Distribution of Wealth*, I, 51–93, 132–258, 295–443, II, 475–549; Duguit in *Progress of the Law in the Nineteenth Century* (Continental Legal History Series, vol. II), 129–146; Vinogradoff, *Historical Jurisprudence*, I, 321–343.

Property, Its Duties and Rights, Historically, Philosophically, and Religiously Considered, 2 ed., essays, 1–3, 5–8; Miller, *Philosophy of Law*, lect. 5; Herkless, *Jurisprudence*, chap. 10; Amos, *Systematic View of the Science of Jurisprudence*, chap. 10; De la Grasserie, *Les principes sociologiques du*

droit civil, chap. 13; Kohler, *Lehrbuch der Rechtsphilosophie*, 81-91 (Albrecht's transl., 120-134).

Letourneau, *Property, Its Origin and Development*; Coulanges, *Ancient City*, bk. 2, chap. 6; Maine, *Ancient Law*, American ed., 237-294; Maine, *Early History of Institutions*, American ed., 98-118; Maine, *Early Law and Custom*, American ed., 335-361; Jenks, *Law and Politics in the Middle Ages*, 148-184, 188-241.

Reference may be made to Felix, *Entwicklungsgeschichte des Eigenthums*, 4 vols., 1883-1899.

The literature of this subject is of enormous extent. For discussions from various points of view, see:

Proudhon, *What is Property?* (transl. by Tucker, 1876); George, *Progress and Poverty*, 1881; George, *A Perplexed Philosopher*, 1892; Cathrein, *Champtions of Agrarian Socialism* (transl. and ed. by Heinze, 1889); Beer, *History of British Socialism*, vol. 1, 1919, vol. 2, 1920.

Simcox, *Primitive Civilization, or Outlines of the History of Ownership in Archaic Communities*, 1897; Laveleye, *Primitive Property* (transl. by Marriott, 1878; the original, "De la propriété et de ses formes primitives," is in a later edition — 4 ed., 1891).

Cosentini, *La réforme de la législation civile* (1913), 371-422; Acollas, *La propriété*, 1886; Budon, *La propriété privée et le droit fiscal*, 1905; Dugast, *La propriété devant le droit naturel*, 1904; Fouillée, *La propriété social et la démocratie*, 1884; Hayem, *Essai sur le droit de propriété et ses limites*, 1910; Landry, *L'utilité sociale de la propriété individuelle*, 1901; Marguery, *Le droit de propriété et le régime démocratique*, 1906; Meyer, *L'utilité publique et la propriété privée*, 1893; Parthenin, *Le droit social sur les choses: Essai sur la nature des propriétés collectives*, 1908; Petrucci, *Les origines naturelles de la propriété*, 1905; Tarbouriech, *Essai sur la propriété*, 1901; Thézard, *La propriété individuelle: Étude de philosophie historique du droit*, 1872; Thomas, *L'utilité publique et la propriété privée*, 3 vols., 1904.

Bernstein, *Gesellschaftliche- und Privateigenthum*, 1891; Berolzheimer, *System der Rechts- und Wirthschaftsphilosophie*, IV, §§ 1-13; Karner, *Die sociale Funktion der Rechtsinstitute, besonders des Eigenthums*, 1904.

Conti, *La proprietà fondiaria nel passato e nel presente*, 1905; Cosentini, *Filosofia del diritto* (1914), 250-279; Fadda, *Teoria della proprietà*, 1907; Labriola, *Sul fondamento della proprietà privata*, 1900; Loria, *La proprietà fondiaria e la questione sociale*, 1897; Piccione, *Concetto positivo del diritto di proprietà*, 1890; Velardita, *La proprietà secondo la sociologia*, 1898; Zini, *Proprietà individuale o collettiva*, 1878.

Perreau, *Cours d'économie politique*, II, §§ 623-695 (1916); Wagner, *Volks-wirtschaft und Recht, besonders Vermögensrecht* (pt. 2 of *Grundlegung der politischen Oekonomie*) 3 ed. 1923.

Succession and Testamentary Disposition

Kohler, *Rechtsphilosophie und Universalrechtsgeschichte*, §§ 25-27; Kohler, *Lehrbuch der Rechtsphilosophie*, 132-142 (Albrecht's transl., 192-206); De la Grasserie, *Les principes sociologiques du droit civil*, chaps. 11, 12.

Vinogradoff, *Historical Jurisprudence*, I, 274-295; Coulanges, *Ancient City*, bk. 2, chap. 7; Maine, *Early Law and Custom*, American ed., 78-121; Maine, *Ancient Law*, American ed., 166-208, 209-236; Gaius, iii, § 1 and §§ 9-26; Salic Law (transl. in Henderson, *Historical Documents of the Middle Ages*), tit. 59; Pollock and Maitland, *History of English Law*, bk. 11, chap. 6, §§ 1, 3.

On inheritance by illegitimate children, see Castberg, *Children's Rights Laws and Maternity Insurance in Norway*, *Journ. Soc. Compar. Leg.*, N. S., XVI, 283, 285 ff.; *Laws of N. Dak. 1917*, chap. 70; Freund, *Illegitimacy Laws of the United States*, 1919.

b. *Freedom of industry and contract*

Green, *Principles of Political Obligation*, § 210; Pound, *Liberty of Contract*, 18 *Yale Law Journ.* 454.

c. *Promised advantages*

Ely, *Property and Contract*, II, 576-751.

Amos, *Systematic View of the Science of Jurisprudence*, chap. 11; Herkless, *Jurisprudence*, chap. 12; Kohler, *Lehrbuch der Rechtsphilosophie*, 91-132 (Albrecht's transl., 134-191); De la Grasserie, *Les principes sociologiques du droit civil*, chap. 6.

d. *Advantageous relations with others*

{	Contractual,
	Social,
	Business,
	Official,
	Domestic.

The "Right of Association"

Dicey, *Law and Opinion in England*, 95-102, 190-200, 266-272, 435-475; Duguit, *Le droit social et le droit individuel*, 107-143; Nourisson, *Histoire de la liberté d'association en France depuis 1789*, 2 vols. (1920); Kliwansky, *Die strafbaren Verbindungen nach Russischen Recht* (diss., 1912).

2. *Public*

Jellinek, *System der subjektiven öffentlichen Rechte*, 2 ed.; Jellinek, *Allgemeine Staatslehre*, 3 ed., 169-173; Salmond, *Jurisprudence*, § 119; Gareis, *Science of Law* (transl. by Kocourek), § 47; Duguit, *Manuel de droit constitutionnel*, 3 ed., § 15.

Interests {	{	Of the state as a juristic person {	personality
			substance
		Of the state as guardian of social interests	

Fleischmann, *The Dishonesty of Sovereignties*, 33 *Rep. N. Y. State Bar Ass'n* (1910), 229; Singewald, *The Doctrine of Non-suability of the State in the United States* (*Johns Hopkins University Studies*, ser. XXVIII, no. 3); Laski, *The Responsibility of the State in England*, 32 *Harvard Law Rev.* 447; Maguire, *State Liability for Tort*, 30 *Harvard Law Rev.* 20; *Moffatt v. United States*, 112 U. S. 24; Borchard, *State Indemnity for Errors of Criminal Justice* (62d Congress, 3d Session, Senate Document, no. 974); Borchard, *Government Liability in Tort*, 34 *Yale Law Journ.* 1, 129, 229; 36 *Id.* 1, 757, 1039.

3. *Social*

Pound, *Legislation as a Social Function*, Publications of the American Sociological Society, VII, 148; Starr, *Individualist and Social Conceptions of the Public*, 12 *Illinois Law Rev.* 1; Green, *Principles of Political Obligation*, §§ 207–209, 233–246; Jhering, *Der Zweck im Recht*, 3 ed., I, 452–466 (*Law as a Means to an End*, 332–347).

(i) *General security*

- { Safety,
- { Health,
- { Peace and order,
- { Security of transactions,
- { Security of acquisitions.

Grotius, iii, 20, 7; Montesquieu, *L'esprit des lois*, liv. 26, chap. 23; Stat. Westm. I, preamble; Coke, *Second Institute*, 158; Noy, *Maxims*, no. 26; 1 Hale, *Pleas of the Crown*, 53–55; *Governor v. Meredith*, 4 T. R. 794–797; 4 Blackstone, *Commentaries*, 166–168; *Com. v. Alger*, 7 Cush. 53, 84; *Thorpe v. Rutland R. Co.*, 27 Vt. 140, 149; *Slaughter House Cases*, 16 Wall. 36, 61; 1 Blackstone, *Commentaries*, 340–354; 4 Blackstone, *Commentaries*, 142–153; *Rogers v. Goodwin*, 2 Mass. 475, 477; *Harrow v. Myers*, 29 Ind. 469; *Rothschild v. Grix*, 31 Mich. 150, 152; *Kneeland v. Milwaukee*, 15 Wis. 691, 692; *Lozon v. Pryse*, 4 My. & Cr. 600, 617; *Ralston v. Hamilton*, 4 Macqueen, 397, 405; Black, *Judicial Precedents*, §§ 76–80; *In re Airey*, [1897] 1 Ch. 164, 169; *Bank v. Dandridge*, 12 Wheat. 64, 69–70.

Gaius, ii, § 44; Pufendorf, *De Iure naturae et gentium*, iv, 12, 1–3; Colin et Capitant, *Droit civil français*, I, 875–876; *Bell v. Morrison*, 1 Pet. 351, 360.

Institutes, ii, 7, § 2; French Civil Code, § 931; German Civil Code, § 518; Moeneclae, *De la renaissance du formalisme dans les contrats en droit civil et commercial français*; Stat. 29 Car. II, ch. 3.

Case of Market Overt, 5 Co. 83 b; French Civil Code, §§ 2279–2280; German Civil Code, § 931.

Torrens, *Essay on the Transfer of Land by Registration*; Dumas, *Registering Title to Land*, 94–102; *Yerger v. Young*, 9 Yerg. (Tenn.) 37, 42.

English Bills of Exchange Act, § 38 (2); *Negotiable Instruments Law*, § 57; Thaller, *Traité élémentaire de droit commercial*, 5 ed., §§ 900–917; Cosack, *Lehrbuch des Handelsrechts*, 7 ed., § 28 (II).

Huston, *Enforcement of Decrees in Equity*, 124–131.

(ii) *Security of social institutions*

- { Domestic,
- { Religious,
- { Political,
- { Economic.

1 Story, *Equity Jurisprudence*, §§ 274–291; 2 Story, *Equity Jurisprudence*, §§ 1427–1428; 2 Bishop, *New Commentaries of Marriage, Divorce, and Separation*, §§ 249–266; Muirhead, *Historical Introduction to the Private Law of Rome*, 3 ed., 274–276; Rudorff, *Römische Rechtsgeschichte*, I, § 27; Digest, xxv, 2, 2.

Institutes, i, 10, §§ 12–13; Code, v, 27, 11, § 3; Colin et Capitant, *Droit civil français*, 4 ed., I, 257–314; German Civil Code, § 1699; Schuster, *German*

Civil Law, §§ 425-427; 1 Blackstone, Comm. 446, 454-458; Stimson, American Statute Law, §§ 6631-6632; *In re De Laveaga's Estate*, 142 Cal. 158; *Pederson v. Christofferson*, 97 Minn. 491; *Watts v. Owens*, 62 Wis. 512.

Maine, Early History of Institutions, lect. 11; Dicey, Law and Public Opinion in England, 2 ed., 371-398; Colin et Capitant, Droit civil français, 4 ed., I, 614-652; Barbey, French Family Law, 34 Reports American Bar Ass'n, 431; Schuster, German Civil Law, §§ 413-419.

Hegel, Philosophy of Right (transl. by Dyde), §§ 158-181; Ahrens, Cours de droit naturel, 8 ed., II, §§ 96-102, 127; Kohler, Philosophy of Law (transl. by Albrecht), 98-119; Miller, Lectures on the Philosophy of Law, 150-175.

Devine, Pensions for Mothers, American Labor Legislation Review, III, 191.

Hegel, Philosophy of Right (transl. by Dyde), § 270; Kohler, Philosophy of Law (transl. by Albrecht), 221, 223; Miller, Lectures on the Philosophy of Law, 365-371; Liroy, Philosophy of Right (transl. by Hastie), I, 151-198; Ahrens, Cours de droit naturel, 8 ed., II, §§ 130-131; Haring, Grundzüge des katholischen Kirchenrechts, 2 ed., §§ 24-25; Gareis und Zorn, Staat und Kirche in der Schweiz, I, §§ 2-3; Duguit, Traité de droit constitutionnel, II, §§ 110-112; Desdèviès du Désert, L'église et l'état en France (1907-1908); Guerlac, The Separation of Church and State in France, Political Science Quarterly, XXIII, 258; Stammler, Recht und Kirche (1917); 4 Blackstone, Comm., 42-64; *Vidal v. Girard*, 2 How. 127, 198; *Bloom v. Richards*, 2 Ohio St. 387, 390-392; *Zeisweiss v. James*, 63 Pa. St. 465, 470; *Bowman v. Secular Society*, [1917] A. C. 406 (see comment in 31 Harvard Law Rev. 289); Ahrens, Der strafrechtliche Schutz des religiösen Gefühls; Misch, Der strafrechtliche Schutz der Gefühle, (diss. 1911); Stuck, Die Religionsvergehen im Reichsstrafgesetzbuch (diss. 1912); Tempski, Die Religionsvergehen, (diss. 1908); Lord Coleridge, C. J., in *Reg. v. Bradlaugh*, 15 Cox, C. C. 217.

Kant, Philosophy of Law (transl. by Hastie), 174-182; Figgis, Divine Right of Kings, 2 ed., 219-266.

Strachan-Davidson, Problems of the Roman Criminal Law, I, 11-19; Liszt, Lehrbuch des deutschen Strafrechts, 20 ed., §§ 104-165; Garraud, Droit pénal français, 3 ed., III, § 215; Donogh, History and Law of Sedition and Cognate Offences (1917); Liberty of Speech, Papers and Proceedings of American Sociological Society, vol. 9 (1914); Chafee, Freedom of Speech in War Time, 32 Harvard Law Rev. 932; Chafee, Freedom of Speech (1920); Nelles, Espionage Act Cases (1918); 4 Blackstone, Comm., 74-93, 103-118, 119, 126; *State v. Haffer*, 94 Wash. 136 "[Libel" on George Washington].

(iii) *General morals*

1 Bishop, New Criminal Law, §§ 500-506; Liszt, Lehrbuch des deutschen Strafrechts, 20 ed., § 103; Garraud, Droit pénal français, 2 ed., V, §§ 1795-1800; Stockdale v. Onwhyn, 7 Dowl. & Ry. 625; *Greenhood*, Public Policy, 136-177, 201-210, 222-237, 292-296, 306-315, 357-367; Code of Justinian, viii, 38, 4; Digest, xlv, 1, 26; French Civil Code, arts. 1133, 1965; German Civil Code, § 138 (1); Phelps, Juridical Equity, §§ 256-259; Savigny, System des heutigen römischen Rechts, I, 407-410 (Holloway's transl., 332-334); Salkowski, Roman Private Law (transl. by Whitfield), § 57.

See also Misch, Der strafrechtliche Schutz der Gefühle (diss. 1911).

(iv) *Conservation of social resources*

- { Use and conservation of natural resources,
- { Protection and education of dependents and defectives,
- { Reformation of delinquents,
- { Protection of the economically dependent.

Digest, xliii, 12, 1, §§ 3-4; Digest xliii, 14, 1, pr. and §§ 1-6; Digest, xliii, 20, 1, pr. and §§ 1-12; French Civil Code, arts. 538, 642-645; Planiol, *Traité élémentaire de droit civil*, 9 ed., I, § 2428; Wulff und Herold, *Wassergesetz vom 7 April, 1913*.

Walls v. Midland Carbon Co., 254 U. S. 300.

Embrey v. Owen, 6 Ex. 353; *Lux v. Haggin*, 69 Cal. 255; Const. Ariz. art. 17, §§ 1-2; Const. Col. art. 16, §§ 5-6; Const. Idaho, art. 15, § 3; Const. Mont., art. 3, § 15; Const. N. D., § 210; Const. N. M., art. 16, §§ 1-2; Const. Utah, art. 17; Const. Wash., art. 1, § 16, art. 21, § 1; Const. Wyo., art. 8, §§ 1-3. See Swain, *Conservation of Water by Storage*, chaps. 3-5, and review in 28 *Harvard Law Rev.* 824.

Ohio Oil Co. v. Indiana, 177 U. S. 190; *Manufacturers Gas Co. v. Indiana Natural Gas Co.*, 155 Ind. 461, 468-474.

Case of Mines, Plowd, 310; 1 *Lindley, Mines*, 3 ed., §§ 200-200c.

Geer v. Connecticut, 161 U. S. 519; *American Express Co. v. People*, 133 Ill. 649; *Haggerty v. Storage Co.*, 243 Mo. 238; *State v. Dow*, 70 N. H. 286.

1 *Blackstone, Commentaries*, 460-467; Spence, *History of the Equitable Jurisdiction of the Court of Chancery*, I, 611-615; *Institutes*, i, 13, 15, 18, 20, 22, 23, pr. and § 1; French Civil Code, arts. 388-487.

See Jones and Bellot, *Law of Children and Young Persons*, 1909; Hart, *Juvenile Court Laws in the United States*, 1910; Breckinridge and Abbott, *The Delinquent Child and the Home*, 1912; Flexner and Baldwin, *Juvenile Courts and Probation*, 1914; Eliot, *The Juvenile Court and the Community*, 1914; Lou, *Juvenile Courts in the United States*, 1927 (full bibliography); United States Department of Justice, *Supplement to Annual Report for 1914* — First Report of Committee to Study the Need for Legislation Affecting Children in the District of Columbia, 1915; Fertig and Hennestad, *Compilation of Laws Relating to Juvenile Courts and Dependent, Neglected, and Delinquent Children*, 1916; Flexner and Oppenheimer, *The Legal Aspect of the Juvenile Court*, Children's Bureau Publication No. 99, 1922; London Committee for Investigating Juvenile Delinquency, *Report of Committee for Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis*, 1916; Missouri Code Commission, *Complete Revision of the Laws for the Welfare of Missouri Children*, 2 ed., 1917; *Annual Reports of the Society for the Reformation of Juvenile Delinquents*; Baernreither, *Jugendfürsorge und Strafrecht in den Vereinigten Staaten*, 1905; Stammer, *Strafvollzug und Jugendschutz in Amerika*, 1911; André, *Tribunaux pour enfants et liberté surveillée*, 1914; French *Loi du 22 Juillet, 1912* and *Décret du 31 Août, 1913*.

See Goldmark, *Child Labor Legislation Handbook* (in *Annals of the American Academy of Political and Social Science*, vol. 31, 1908); Scott, *Child Labor* (Summary of Laws in Force, 1910), American Association for Labor Legislation, *Legislative Review*, no. 5 (1910); Meyer and Thompson, *List of References on Child Labor* (United States Children's Bureau, 1916); National Association of Manufacturers, *National Education and Employment Program*, 1927.

Aristotle, *Politics*, viii, 1-2 (Jowett's transl. I, 244-245); Lioy, *Philosophy of Right* (Hastie's transl.), I, 224-226; Lorimer, *Institutes of Law*, 2 ed., 225-226; Miller, *Lectures on the Philosophy of Law*, 182-184; Ahrens, *Cours de droit naturel*, 8 ed., II, § 133; Spencer, *Social Statics*, 153-184; Spencer, *Principles of Ethics*, I, §§ 236-237; Wilson, *The State*, § 1534; Dicey, *Law and Public Opinion in England*, 2 ed., 276-279.

1 *Blackstone, Commentaries*, 302-306; Spence, *History of the Equitable Jurisdiction of the Court of Chancery*, I, 618-620; *Institutes*, i, 23, §§ 3-4;

Colin et Capitant, *Droit civil français*, 4 ed., I, 572–613; Schuster, *German Civil Law*, §§ 28–31; Henderson, *Dependents, Defectives, and Delinquents*, 169–209.

See Barrows, *Indeterminate Sentence and the Parole Law*, 1899; Barrows, *Reformatory System in the United States*, 1900; Miner, *Probation Work in the Magistrates' Courts of New York City*, 1909; Henderson, *Penal and Reformatory Institutions*, 1910; Brockway, *Fifty Years of Prison Service*, 1912; Ives, *History of Penal Methods*, 1914; Leeson, *The Probation System*, 1914; Lewis, *The Offender*, 1917; Herr, *Das moderne amerikanische Besserungssystem*, 1907; Cooley, *New Goals in Probation*, 1926; Cooley, *Probation and Delinquency*, 1927.

See Frankfurter and Goldmark, *Brief in Oregon Minimum Wage Cases*, 1917; Brown, *Minimum Wage, with Particular Reference to the Legislative Minimum Wage under the Minnesota Statute of 1913* (1913); Andrews, *Minimum Wage Legislation*, 1914; Tawney, *Establishment of Minimum Rates in the Chainmaking Industry*, 1914; Tawney, *Establishment of Minimum Rates in the Tailoring Industry*, 1915; Bulkley, *Establishment of Legal Minimum Rates in the Boxmaking Industry*, 1915; Andrews and Hobbs, *Economic Effects of the War upon Women and Children in Great Britain*, 1918; California Industrial Welfare Commission, *Report on Wage Board in the Fruit and Canning Industry*, 1916; Connecticut State Bureau of Labor, *Report on Conditions of Wage Earning Women and Girls*, 1916; Massachusetts Minimum Wage Commission, *Reports and Bulletins*; Minnesota Minimum Wage Commission, *Biennial Report for 1913–1914*.

Adkins v. Children's Hospital, 261 U. S. 525; *The Supreme Court and Minimum Wage Legislation*, Compiled by the National Consumers' League, 1925; Brown, *Judicial Regulation of Rates of Wage for Women*, 28 *Yale Law Journ.*, 236.

Dicey, *Law and Public Opinion in England*, 2 ed., 220–240; Ruegg, *Changes in the Law of England Affecting Labour*, in *A Century of Law Reform*, 1901; Commons and Andrews, *Principles of Labor Legislation*, 1916; *Annual Reviews of Labor Legislation in American Labor Legislation Review*, 1911. See also *Bulletins of the International Labour Office*; Massachusetts State Board of Labor and Industries, *Reports and Bulletins*; New York State Department of Labor, *Reports and Bulletins*; Pennsylvania Department of Labor and Industry, *Reports*.

Rehabilitation legislation — “Act to create a Commission for the Rehabilitation of Physically Handicapped Persons,” *Laws of New Jersey*, 1919, chap. 74, p. 138.

(v) *General progress*

- { Economic progress,
- { Political progress,
- { Cultural progress.

Economic progress:

- { Freedom of property from restrictions on sale or use,
- { Free trade,
- { Free industry,
- { Encouragement of invention.

Scrutton, *Land in Fetters*, 1886; 2 Blackstone, *Commentaries*, 269–274; *Digest*, viii, 1, 8, pr.; *Digest*, viii, 1, 15, § 1; *Haywood v. Building Society*, 8 Q. B. D. 403; *International Tea Stores Co. v. Hobbes*, [1903] 2 Ch. 165, 172; *Brown v. Burdett*, 21 Ch. D. 667; *Dawkins v. Penrhyn*, 4 App. Cas. 51; Gray,

Restraints on Alienation, 2 ed., § 4; *Dr. Miles Medical Co. v. Park*, 220 U. S. 373; *Park v. Hartman*, 153 Fed. 24, 39; *Hogg, Tulk v. Moxhay and Chattels*, 28 Law Quarterly Rev. 73.

Coke, Second Institute, 47; *Darcy v. Allen*, Moore, 671; *Mitchell v. Reynolds*, 1 P. Wms. 181; Act July 2, 1890, 26 U. S. St. L. 209.

Jacobs v. Cohen, 183 N. Y. 207, 219; Erle, *Law Relating to Trade Unions* (1869), chap. 1, § 3.

Story, *Commentaries on the Constitution*, II, §§ 1151–1152; *Bauer v. O'Donnell*, 229 U. S. 1.

Political progress:

- { Free criticism,
- { Free opinion.

Cooley, *Constitutional Limitations*, chap. 12; *Liberty of Speech*, Papers and Proceedings, American Sociological Soc., vol. 9 (1914); Chafee, *Freedom of Speech in War Time*, 32 Harvard Law Rev. 932; Chafee, *Freedom of Speech* (1920); Eliel, *Freedom of Speech During and Since the Civil War*, 18 American Political Science Rev., 712; *Wason v. Walker*, L. R. 4 Q. B. 73, 93–94; Heuss, *Anreizung zum Klassenkampf* (diss. 1909).

Cultural progress:

- { Free science,
- { Free letters,
- { Encouragement of arts and letters,
- { Encouragement of higher education.

Bury, *History of Freedom of Thought*, 1913; 2 Blackstone, *Commentaries*, 406–407; Const. Mass., chap. 5, § 1, art. 1 (1780).

(vi) *The individual life*

See VII, A, 5, *supra*.

SCHEMES OF INTERESTS TO BE SECURED BY LAW

HIPPODAMUS of Miletus (B. C. C. 408)

He [Hippodamus] also divided his laws into three classes and no more, for he maintained that there are three subjects of law-suits, — insult, injury, and homicide. — Aristotle, *Politics*, ii, 8 (Jowett's transl., I, 47).

BACON (1629)

The use of the law consisteth principally in these three things: 1. To secure men's persons from death and violence. 2. To dispose of the property of their goods and lands. 3. For preservation of their good names from shame and infamy. — Use of the Law, 1 [As to the authorship of this book and its date, see Spedding, *Bacon's Works*, VII, 453–457].

BENTHAM (1802)

In the distribution of rights and obligations the legislator . . . should have for his end the happiness of society. Investigating

more distinctly in what that happiness consists, we shall find four subordinate ends:

Subsistence,
Abundance,
Equality,
Security.

The more perfect enjoyment is in all these respects, the greater is the sum of social happiness: and especially of that happiness that depends upon the laws.

We may hence conclude that all the functions of law may be referred to these four heads: To provide subsistence; to produce abundance; to favor equality; to maintain security. — *Theory of Legislation, Principles of the Civil Code*, chap. 2 (Hildreth's transl.).

XIV

THE SECURING OF INTERESTS

A

VALUING OF INTERESTS

Korkunov, *General Theory of Law* (Hastings' transl.), § 25; Kantorowicz, *Rechtswissenschaft und Soziologie*, 17–23; Demogue, *Notions fondamentales du droit privé*, 170–200; Charmont, *The Conflict of Interests Legally Protected in French Law*, 13 *Illinois Law Rev.* 461; Brown, *Judicial Regulation of Rates of Wage for Women*, 28 *Yale Law Journ.*, 236.

Geny, *Méthode d'interprétation*, 2 ed., II, § 220.

Walls v. Midland Carbon Co., 254 U. S. 300.

B

MEANS OF SECURING INTERESTS

Salmond, *Jurisprudence*, chaps. 4, 10, 11; Saleilles, *The Individualization of Punishment* (Mrs. Jastrow's transl.), chaps. 2–7; Bryce, *Studies in History and Jurisprudence*, essay 9; Stammer, *Wirthschaft und Recht*, §§ 92–98.

Bentham, *Theory of Legislation* (Hildreth's transl.), *Principles of Legislation*, chaps. 7–11, *Principles of the Penal Code*, pt. 3; Austin, *Jurisprudence*, 4 ed., I, 91 ff.; Pollock, *First Book of Jurisprudence*, 5 ed., 21–27; Salmond, *Jurisprudence*, § 32.

(1) Legal personality (see *post*, XXIV).

(2) Legal rights (see *post*, XX).

- (3) Powers (see *post*, XXI).
- (4) Liberties and Privileges (see *post*, XXII).
- (5) Punishment.
- (6) Redress (see *post*, XXXII).
 - (i) Specific
 - (ii) Substitutional
- (7) Prevention (see *post*, XXXII).

Pound, Preventive Justice and Social Work, Proceedings of National Conference of Social Work, 1923, 151.

C

LIMITS OF EFFECTIVE LEGAL ACTION

1. *Limits in respect of application and subject-matter*

Bentham, Theory of Legislation, Principles of Legislation, chap. 12; Pollock, First Book of Jurisprudence, pt. 1, chap. 2; Amos, Science of Law, chap. 3; Green, Principles of Political Obligation, §§ 11-31; Korkunov, General Theory of Law (Hastings' transl.), §§ 5-7; Gareis, Science of Law (Kocourek's transl.), § 6. See X, *supra*.

2. *Social-psychological limitations upon enforcement of legal precepts*

Spinoza, Tractatus Politicus, chap. 10, § 5 (Elwes' transl., p. 381); Duff, Spinoza's Political and Ethical Philosophy, chap. 22; Markby, Elements of Law, §§ 48-59; Salmond, Jurisprudence, § 30; Jellinek, Allgemeine Staatslehre, 2 ed., 89 ff., 324 ff.; Pound, The Limits of Effective Legal Action, Rep. Pa. Bar Ass'n, XXII, 221, American Bar Ass'n Journal, III, 55, International Journ. of Ethics, XXVII, 150; Cohen, Positivism and the Limits of Idealism in the Law, 27 Columbia Law Rev. 237.

SOURCES, FORMS, MODES OF GROWTH

XV

SOURCES AND FORMS OF LAW

Austin, *Jurisprudence*, lect. 28; Holland, *Jurisprudence*, chap. 5 to I; Salmond, *Jurisprudence*, §§ 31–36; Amos, *Science of Law*, 2 ed., table facing page 76; Pollock, *First Book of Jurisprudence*, 5 ed., 231–246; Gray, *Nature and Sources of the Law*, 1 ed., §§ 322–597; Gareis, *Science of Law* (transl. by Kocourek), §§ 8–12; Korkunov, *General Theory of Law* (transl. by Hastings), §§ 51–54.

Carter, *The Ideal and the Actual in the Law*, 9–11; Carter, *Law: Its Origin, Growth, and Function*, lect. 5; Miraglia, *Comparative Legal Philosophy* (transl. by Lisle), §§ 152–165; Collinet, *The General Problems Raised by the Codification of Justinian*, *Tijdschrift voor Rechtsgeschiedenis*, IV, 1, 9.

Austin, *Jurisprudence*, lect. 30; Holland *Jurisprudence*, chap. 5, subdiv. I; Clark, *Practical Jurisprudence*, 196–201, 324–334; Salmond, *Jurisprudence*, §§ 42, 43, 46–48; Pollock, *First Book of Jurisprudence*, 5 ed., 280–290; Gray, *Nature and Sources of the Law*, 1 ed., §§ 598–641.

Rattigan, *Science of Jurisprudence*, §§ 72–74; Jenks, *Law and Politics in the Middle Ages*, 56–63; Hastie, *Outlines of Jurisprudence*, 37–39.

1. Sources and forms of law in general.

Ambiguity of “sources of law” as used in the books.

The source of authority of legal precepts.

The methods and agencies by which precepts are formulated.

The authoritative shapes which legal precepts assume; the forms in which they are expressed and to which courts are referred in the decision of controversies.

2. Sources of law.

A. Custom as a source of law — customary law.

Allen, *Law in the Making*, chaps. 1–2.

Geny, *Méthode d'interprétation*, 2 ed., I, §§ 109–137; Ehrlich, *Grundlegung der Soziologie des Rechts*, 352–380.

Vinogradoff, *Custom and Right*; Vinogradoff, *Customary Law*, in Crump and Jacob, *The Legacy of the Middle Ages*, 288–319.

(1) Historical.

The judge precedes the law; judgments precede customary law.

Historical development of customary law.

Relation of customary law to the development of the state.

Bryce, *Studies in History and Jurisprudence*, 280-284; Markby, *Elements of Law*, §§ 79-85.

As to non-litigious custom as a form of social control and source of law, see Vinogradoff, *Historical Jurisprudence*, I, 368-369.

(2) Philosophical.

The philosophical basis of customary law.

Lorimer, *Institutes of Law*, 2 ed., 515-516; Pollock, *Essays in Jurisprudence and Ethics*, 53-59; Kohler, *Einführung in die Rechtswissenschaft*, § 5; Stammler, *Theorie der Rechtswissenschaft*, 114-136.

(3) Analytical.

Nature of "customary law."

Customary course of popular action.

Customary course of magisterial action.

Customary course of advice to litigants by those learned in the law.

Customary course of judicial action.

Reaction of law and custom.

Theories of the formulation of law by custom.

Relation of custom to legislation.

Relation of custom to judicial decision.

Customary law and democracy.

Amos, *Science of Law*, 2 ed., 390.

(4) Customary law in the several legal systems.

(a) In Roman law.

(b) In the common law.

Brown, *The Austinian Theory of Law*, §§ 569-605; Markby, *Elements of Law*, §§ 90-91; Clark, *Practical Jurisprudence*, 316-323.

(c) Custom in international law.

Oppenheim, *International Law*, I, §§ 16-17.

B. Sources in general.

Sources in archaic law.

Sources in the Roman law.

Sources in the law of Continental Europe.

Sources in Anglo-American law.

Enacted law.

Not enacted.

Judicial.

Non-Judicial.

Books of authority.

Writings not of authority.

As to commercial usage as law, see Blackstone, Commentaries, I, 75; Wooddesson, Lectures on the Law of England, III, 53; Christian, Note to Blackstone, I, 75; Goodwin *v.* Robarts, L. R. 10 Ex. 337; 1 Morse, Banks and Banking, 70 *n.*; President and Directors of Manhattan Company *v.* Morgan, 242 N. Y. 38, 48-50; Oertmann, Rechtsordnung und Verkehrssitte.

3. Forms of law.

1. Legislation.

2. Case law.

3. Text-book law.

Forms in the Roman law.

Legislation	{	<i>leges.</i>
		<i>plebiscita.</i>
		<i>senatus consulta.</i>
		constitutions of the emperors (<i>principum placita</i>).

Edicts of the Magistrates.

Responsa of the juriconsults.

Treatises of the juriconsults.

Forms in the law of Continental Europe.

Legislation.

Jurisprudence (*Gerichtsgebrauch*).

Doctrine.

Forms in Anglo-American law.

Legislation — with us, constitutions, treaties, statutes.

Judicial decisions.

Authoritative books.

Forms in International Law.

See art. 38 of Statute of the Permanent Court of International Justice; Cayuga Indian Claims, 20 American Journal of International Law, 574, 581-586 and citations.

XVI

THE TRADITIONAL ELEMENT

A

LAW AS A PRIESTLY TRADITION

Maine, Ancient Law, chap. 1, and Sir Frederick Pollock's notes B and C; Maine, Early Law and Custom (American ed.), 45-49; Coulanges, Ancient City, bk. 3, chap. 11; Mayne, Hindu Law, §§ 14-40; Kent, Israel's Laws and Legal Precedents, 8-15; Vinogradoff, Historical Jurisprudence, I, 367-368; Hirzel, Themis, Dike und Verwandtes.

B

LAW AS A POPULAR TRADITION

Brunner, *Deutsche Rechtsgeschichte*, §§ 13, 37; Siegel, *Deutsche Rechtsgeschichte*, § 2.

C

LAW AS A JURISTIC TRADITION

Clark, *Practical Jurisprudence*, 273-339; Muirhead, *Historical Introduction to the Private Law of Rome*, §§ 50, 61-64; Maitland, *English Law and the Renaissance*, 24-35; Holdsworth, *History of English Law*, II, 484-508; Grueber, *Introduction to Ledlie's Translation of Sohm, Institutes of Roman Law* (1 ed.); Dernburg, *Pandekten*, I, §§ 16-17; Windscheid, *Pandekten*, I, §§ 7-10; Brissaud, *Manuel d'histoire du droit civil Français*, 348-361, 388-400; Stintzing, *Geschichte der deutschen Rechtswissenschaft*.

D

MODES OF GROWTH

1. *Fictions*

Maine, *Ancient Law*, chap. 2, and Sir Frederick Pollock's note; Austin, *Jurisprudence*, 3 ed., 629-631; Gray, *Nature and Sources of the Law*, 1 ed., §§ 74-89; Phelps, *Juridical Equity*, § 150; Tourtoulon, *Philosophy in the Development of Law*, 644-653.

Jhering, *Geist des römischen Rechts*, III, § 58; Bernhöft, *Zur Lehre von den Fiktionen*; Demogue, *Notions fondamentales du droit privé*, 238-251; Stammler, *Theorie der Rechtswissenschaft*, 328-333; Lecocq, *Fiction comme procédé juridique*; Sturm, *Fiktion und Vergleich in der Rechtswissenschaft*; Kornfeld, *Allgemeine Rechtslehre und Jurisprudenz*, 45-60; Vinogradoff, *Historical Jurisprudence*, I, 365-367; Malachow, *Rechtserkenntnisstheorie und Fiktionslehre*.

Gaius, iv, §§ 32-38; 3 Blackstone, *Commentaries*, 43, 44-45, 152-153, 159-165, 200-206, 274-275, 283, 284-287; Gaius, i, §§ 111, 114-115, 119-123, 132, 134, ii, §§ 24, 103-105; Ulpian, *Rules*, i, §§ 7, 8; 2 Blackstone, *Commentaries*, 348-363, particularly 360, 363; Curtis, *Jurisdiction of the United States Courts*, 127-133.

See also Vaihinger, *Philosophy of "As If"* (transl. by Ogden) 33-35, 85-95.

2. *Interpretation*

Clark, *Practical Jurisprudence*, 235-244; Austin, *Jurisprudence*, 3 ed., 1023-1036; Pound, *Spurious Interpretation*, 7 *Columbia Law Rev.* 379; Gray, *Nature and Sources of the Law*, §§ 370-399, 2 ed., 170-189; Geny, *Méthode d'interprétation*, 2 ed., I, §§ 92-108, II, §§ 177-187; Allen, *Law in the Making*, 273-289.

Salkowski, *Roman Private Law* (Whitfield's transl.), § 5; Walton, *Introduction to Roman Law*, 4 ed., 110-111; Buckland, *Text Book of Roman Law*, 2; Stammler, *Theorie der Rechtswissenschaft*, 558-652; Heck, *Gesetzesaus-*

legung und Interessenjurisprudenz, §§ 1-16; Darmstetter, Recht und Rechtsordnung, Beiträge vom Willen des Gesetzgebers, chaps. 5-7; Degni, L'interpretazione della legge, 2 ed.

3. *Equity*

Maine, Ancient Law, chap. 3, and Sir Frederick Pollock's note F; Clark, Practical Jurisprudence, 340-379; Allen, Law in the Making, chap. 5.

Austin, Jurisprudence, lect. 36; Salmond, Jurisprudence, § 15; Sohm, Institutes of Roman Law (Ledlie's transl., 3 ed.), §§ 15-17; Markby, Elements of Law, §§ 120-122; Pound, The Decadence of Equity, 5 Columbia Law Rev. 20.

Buckland, Equity in Roman Law.

4. *Natural law*

Bryce, Studies in History and Jurisprudence, essay 11; Maine, Ancient Law, chaps. 3, 4, and Sir Frederick Pollock's notes, F, G, and H; Pollock, The Expansion of the Common Law, 107-138; Holland, Jurisprudence, chap. 3, subdiv. I; Korkunov, General Theory of Law (transl. by Hastings), §§ 14-17.

Pollock, History of the Law of Nature, 1 Columbia Law Rev. 11, Essays in the Law, 31-79; Salmond, The Law of Nature, 11 Law Quart. Rev. 121; Grotius (Whewell's transl.), i, 1, §§ 10-11; Markby, Elements of Law, §§ 116-117; Rattigan, Science of Jurisprudence, §§ 13, 20b.

5. *Juristic science*

Austin, Jurisprudence, 3 ed., 653-659; Gray, The Nature and Sources of the Law, 1 ed., §§ 551-597a; Korkunov, General Theory of Law (Hastings' transl.), § 64; Bierling, Juristische Prinzipienlehre, IV, §§ 53-58; Stammeler, Theorie der Rechtswissenschaft, 262-363; Demogue, Notions fondamentales du droit privé, 225-238.

Gareis, Science of Law (Kocourek's transl.), § 12c; Sohm, Institutes of Roman Law (Ledlie's transl., 3 ed.), §§ 18-20; Beseler, Volksrecht und Juristenrecht, 299-364; Windscheid, Pandekten, I, §§ 23-24; Dernburg, Pandekten, I, § 38; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 11; Geny, Les procédés d'élaboration du droit civil (in Les méthodes juridiques); Del Vecchio, Il sentimento giuridico.

6. *Judicial empiricism*

Austin, Jurisprudence, lects. 38 and 39, pt. I; Pollock, Essays in Jurisprudence and Ethics, 237-261; Gray, Nature and Sources of the Law, 1 ed., §§ 420-550; Clark, Practical Jurisprudence, 223-226, 255-265; Dillon, Laws and Jurisprudence of England and America, 229-237, 242-253; Thayer, Judicial Legislation: Its Legitimate Function in the Development of the Common Law,

5 Harvard Law Rev. 172; Pound, Spirit of the Common Law, lect. 7; Cardozo, The Nature of the Judicial Process, lect. 3; Cardozo, The Growth of the Law, lects. 3-5; Pound, Theory of Judicial Decision, 36 Harvard Law Rev. 641, 802, 940; Allen, Law in the Making, chaps. 3-4.

Markby, Elements of Law, §§ 95-99; Cruet, La vie du droit et l'impuissance des lois; Carter, Law: Its Origin, Growth and Function; Stammeler, Legislation and Judicial Decision, 23 Michigan Law Rev. 362; Cohen, The Process of Judicial Legislation, 48 American Law Rev. 161.

As to nineteenth-century method in American law, see Holmes, Collected Papers, 231-232; Pound, Mechanical Jurisprudence, 8 Columbia Law Rev. 605; Holbrook, Epithetical Jurisprudence, 18 Michigan Law Rev. 407; Drake, The Rule of Law and the Legal Right, 9 Michigan Law Rev. 365.

7. *Comparative law*

Bryce, Studies in History and Jurisprudence (American ed.), 619-623; Maine, Village Communities (American ed.), 3-6; Demogue, Notions fondamentales du droit privé, 268-285.

Meili, Institutionen der vergleichenden Rechtswissenschaft; Lambert, La fonction du droit civil comparé; Bernhöft, Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft; Jitta, La substance des obligations dans le droit international privé, § 7; Wenger, Römisches Recht und Rechtsvergleichung, Archiv für Rechts- und Wirthschaftsphilosophie, XIV, 1, 106.

8. *Sociological study*

Holmes, The Path of the Law, 10 Harvard Law Rev. 456, 467 ff.; Keasbey, The Courts and the New Social Questions, 24 Green Bag, 114; Kantorowicz, Rechtswissenschaft und Soziologie, 8 ff.; Ehrlich, Grundlegung der Soziologie des Rechts, 393-409; Geny, Méthode d'interprétation, 2 ed., II, § 221.

Palfrey, The Constitution and the Courts, 26 Harvard Law Rev. 507, 517, 530; Veasey, The Law of Oil and Gas, 18 Michigan Law Rev. 445, 452-455; Heck, Gesetzesauslegung und Interessenjurisprudenz, § 20; Wüstendorfer, Zur Hermeneutik der soziologischen Rechtsfindungstheorie, Archiv für Rechts- und Wirthschaftsphilosophie, IX, 170, 289, 422; Drake, Sociological Interpretation of Law, 16 Michigan Law Rev. 599.

XVII

THE IMPERATIVE ELEMENT

A

LEGISLATIVE LAWMAKING

Korkunov, General Theory of Law (Hastings' transl.), § 54, Salmond, Jurisprudence, §§ 50-54; Miller, Data of Jurisprudence, 238-258; Allen, Law in the Making, 237-273, 349-356.

Maine, *Early History of Institutions* (American ed.), 386-393, 398-400; Clark, *Practical Jurisprudence*, 202-213.

1. *Unconscious legislation*

Maine, *Village Communities* (American ed.), 75, 116.

2. *Declaratory legislation*

Maine, *Early History of Institutions* (American ed.), 26 ff.

Laws of Manu (Bühler's transl.), i, §§ 58-60; Introduction to the *Senchus Mor*, *Ancient Laws and Institutes of Ireland*, I, 3-41; Prologue to the *Lex Salica* (Hessels and Kern, *Lex Salica*, 422-423); Jenks, *Law and Politics in the Middle Ages*, 7-13.

3. *Selection and amendment*

Carter, *Law: Its Origin, Growth, and Function*, 255 ff.

Prologue to *Alfred's Laws* (Thorpe, *Ancient Laws and Institutes of England*, I, 59); *Laws of Howel the Good*, Introduction (Evans, *Welsh Mediaeval Law*, 145-146).

4. *Conscious constructive lawmaking*

Jenks, *Law and Politics in the Middle Ages*, 18-21; Dicey, *Law and Opinion in England*, 45 ff., 48-61; Miller, *Philosophy of Law*, 38 ff.; Pulszky, *Theory of Law and Civil Society*, § 245.

5. *Codification*

See Lecture XVIII, *post*.

B

AGENCIES OF LEGISLATION

1. *Roman law*

Gaius, i, §§ 3-7; *Institutes*, i, 2, §§ 3-10.

2. *English law*

Pollock, *First Book of Jurisprudence*, pt. 2, chap. 7.

Thring, *Practical Legislation*; Ilbert, *Legislative Methods and Forms*; Ilbert, *The Mechanics of Lawmaking*.

3. *American law*

Jones, *Statute Law-Making in the United States*; Shambaugh, *Statute Lawmaking in Iowa* (*Iowa Applied History Series*, vol. 3); Cardozo, *A Ministry of Justice*, 35 *Harvard Law Rev.* 113.

McCarthy, *The Wisconsin Idea*, chaps. 8, 9; Parker, *The Congestion of Law*, 29 *Rep. Am. Bar Ass'n*, 383; Parker, *Address as President of the American Bar Ass'n*, 1907, 19 *Green Bag*, 581; Burges, *Address as President of the Texas Bar Ass'n*, *Proc. Tex. Bar Ass'n*, 1910, 113-131.

4. *The civil law*

Gareis, *Science of Law* (Kocourek's transl.), § 11; Bekker, *Grundbegriffe des Rechts und Misgriffe der Gesetzgebung*, chap. 8; Geny, *La technique législative dans la codification civile moderne*, *Livre du centenaire du code civil Français*, II, 989–1038; Moreau, *La revision du code civil et la procédure législative*, *Id.*, 1041–1071; Beling, *Methodik der Gesetzgebung*, 1–92.

C

SECONDARY LEGISLATION

Allen, *Law in the Making*, 290–348.

Carr, *Delegated Legislation*; Hart, *The Ordinance Making Power of the President*, chaps. 2, 3, 6; Fairlie, *Administrative Legislation*, 18 *Michigan Law Rev.* 90; Foster, *The Delegation of Legislative Power to Administrative Officers*, 7 *Illinois Law Rev.* 397; Parker, *Executive Judgments and Executive Legislation*, 20 *Harvard Law Rev.* 116.

D

RELATION OF THE IMPERATIVE TO THE TRADITIONAL ELEMENT

Savigny, *On the Vocation of Our Age for Legislation and Jurisprudence* (Hayward's transl.); Carter, *Law: Its Origin, Growth, and Function*, 204–220; Dicey, *Law and Opinion in England*, 393–396; Pound, *Common Law and Legislation*, 21 *Harvard Law Rev.* 383; Holland, *Jurisprudence*, 13 ed., 76–78.

1. *Mutual reaction of the traditional and imperative elements*

Dicey, *Law and Opinion in England*, 369–392, 396. See *Smart v. Smart*, [1892] A. C. 425, 432.

2. *The traditional element as a means of interpretation*

Carter, *Law: Its Origin, Growth, and Function*, 309 ff.; Baldwin, *The American Judiciary*, 81–97; Charmont et Chausse, *Les Interprètes du code civil*, *Livre du centenaire du code civil Français*, II, 133–172; Endemann, *Lehrbuch des bürgerlichen Rechts*, I, § 12.

Commercial Nat. Bank v. Canal Bank, 239 U. S. 520.

3. *Analogical reasoning from legislation*

Schuster, *German Civil Law*, § 17; Stammler, *Theorie der Rechtswissenschaft*, 633–641; Capitant, *Introduction à l'étude du droit civil*, 4 ed., 109–114.

4. *Adjustment of the traditional element to legislation and vice versa*

Gray, *Nature and Sources of the Law*, 1 ed., §§ 369–399; Geny, *Méthode d'interprétation*, 2 ed., II, §§ 138–154.

XVIII

CODIFICATION

Austin, *Jurisprudence*, lect. 39, and *Notes on Codification* (3 ed., pp. 1056–1074); Carter, *Law: Its Origin, Growth, and Function*, lects. 11, 12; Clark, *Practical Jurisprudence*, 380–394; Dillon, *Laws and Jurisprudence of England and America*, 178–187; Goadby, *Introduction to the Study of Law*, chap. 4; Birkenhead, *Points of View*, I, 150–190; Isaacs, *The Aftermath of Codification*, 45 *Reports American Bar Ass'n*, 524 (1920).

Amos, *Science of Law*, chap. 13; Amos, *Systematic View of the Science of Jurisprudence*, 471–490; Bryce, *Studies in History and Jurisprudence* (American ed.), 103–105; Clarke, *The Science of Law and Lawmaking* (this whole book is an argument against codification); Danz, *Die Wirkung der Codificationsformen auf das materielle Recht*; Bethmann-Hollweg, *Ueber Gesetzgebung und Rechtswissenschaft als Aufgaben unserer Zeit*; Müller-Essert, *Vom Beruf unsrer Zeit für Gesetzgebung*; Demogue, *Notions fondamentales du droit privé*, 207 ff., and recent French literature cited in note 2; Geny, *Méthode d'interprétation*, 2 ed., I, §§ 37–50; *Livre du centenaire du Code Civil Français*; *Festschrift zur Jahrhundertfeier des allgemeinen bürgerlichen Gesetzbuches*; Goudy, Mackay, and Campbell, *Addresses on Codification of Law*; Carss, *The Codification of Laws*, 40 *Canadian Law Times*, 14, 126, 216, 292, 379, 451; Gregory, *Benthamite Codification*, 13 *Harv. Law Rev.* 374; Holland, *Essays upon the Form of the Law*; Hearn, *Theory of Legal Rights and Duties*, chap. 17; Pollock, *First Book of Jurisprudence*, 5 ed., 365 ff.; Pulszky, *Theory of Law and Civil Society*, §§ 246–247; Salmond, *Jurisprudence*, § 53; Bentham, *Letters to the Citizens of the Several American United States* (on codification); Report of Joseph Story, Theron Metcalf, Simon Greenleaf, Charles E. Forbes, and Luther S. Cushing, Commissioners “to take into consideration the practicability and expediency of reducing to a written and systematic code the common law of Massachusetts or any part thereof,” 1836 (reprinted by David Dudley Field, 1882); Fowler, *Codification in the State of New York*, 2 ed., 1884; Bacon, *Proposition to His Majesty Touching the Compilation and Amendment of the Laws of England*, Spedding, *Letters and Life of Bacon*, VI, 61–71; Terry, *Leading Principles of Anglo-American Law*, §§ 606–612.

Sharswood, *Law Lectures*, lect. 9; Pollock, *Essay on Codification* (prefaced to 4 ed. of his *Digest of the Law of Partnership*); Amos, *An English Code: Its Difficulties and the Mode of Overcoming Them*; Bower, *Code of Actionable Defamation*, Preface; Warren, *History of the American Bar*, chap. 19; Hoadly, *Annual Address before the American Bar Ass'n*, Rep. Am. Bar Ass'n (1889), XI, 219; Sherman, *One Code for all the United States*, 25 *Green Bag*, 460; Boston, *Law — Anachronistic, Progressive*, Rep. Pa. Bar Ass'n (1918), XXIV, 315, 344–345; Chalmers, *An Experiment in Codification*, 2 *Law Quart. Rev.* 125; Acharyya, *Codification in British India*.

Schuster, *The German Civil Code*, 12 *Law Quart. Rev.* 17; Maitland, *The Making of the German Civil Code*, *Collected Papers*, III, 474; Endemann, *Lehrbuch des bürgerlichen Rechts*, I, §§ 3, 4. Reference should be made also to the various papers in the *Livre du centenaire du code civil Français*; De Colyar, Jean Baptiste Colbert and the Codifying Ordinances of Louis

XIV, *Journ. Soc. Comp. Leg.* (N. S.), XIII, 56; Lobingier, *Codification in the Philippines*, *Journ. Soc. Comp. Leg.* (N. S.), X, 239; *Progress of Continental Law in the Nineteenth Century* (Continental Legal History Series, vol. 11) chaps. 5-9.

1. The so-called ancient codes, more or less authoritative publications of traditional law, are generically distinct. They come before a period of legal development. Codes in the modern sense come after a full legal development and simplify the form of the law.

2. Codification in Roman law.

The compilations of Gregorius and Hermogenianus (fourth century A.D.).

The Theodosian Code (A.D. 429-438. Took effect 439).

The Codification of Justinian (A.D. 528-534).

The Code (529, revised and re-enacted 534)

The Digest (533)

The Institutes (533)

The Novels.

3. Modern Codes.

The *Constitutio Criminalis Carolina* (1532).

Partial codification under Louis XIV in France.

The project of Colbert (1667-1670).

The Prussian Code.

The draft code of Frederick the Great (1749)

The *Allgemeines Landrecht* (1780-1794)

The French Civil Code (1800-1804).

Adopted in Belgium, Egypt, and Polish Russia.

Taken as the model in

Argentina (1869, rev. 1883).

Bolivia (1830, rev. 1903).

Chili (1855).

Colombia (1857, rev. 1872).

Costa Rica (1886).

Ecuador (1887).

Guatemala (1877, rev. 1882).

Haiti (1826).

Holland (1838).

Honduras (1880).

Italy (1865).

Louisiana (1808, rev. 1824, 1870).

Mexico (1870, rev. 1884).

Montenegro (1873-1886).

Peru (1851).

Portugal (1867).

Quebec (1866).

Rumania (1864).

Salvador (1880).

San Domingo (1884).

Spain (1889).

Uruguay (1869).

Venezuela (1873).

The Austrian Civil Code (1713–1811).

Projected 1713, draft 1767, partial new draft 1787, put in force 1811.

Taken as a model in

Servia (1844, rev. 1879).

The German Civil Code (1874–1900).

First commission appointed 1874, first draft published 1887, new commission 1890, new draft 1896, took effect 1900.

Taken as a model in

Japan (1896, took effect 1900).

The Swiss Federal Codes.

The Civil Code (1907).

The Code of Obligations (1901).

The Civil Code of Brazil (1917).

As to the history of this code, see Lacerda, *Codigo civil Brasileiro*, pp. iv–lxiv.

Two classes of countries have adopted codes:

- (a) Countries with well-developed legal systems which had exhausted the possibilities of juristic development through the traditional element and required a new basis for a new juristic development.
- (b) Countries which had their whole legal development before them, which required an immediate basis for development.

Conditions which have led to codification:

- (1) The possibilities of juristic development on the basis of the traditional element were exhausted for the time being, or a new basis was required for a country with no juristic past.
- (2) The law was unwieldy, full of archaisms and uncertain.
- (3) The growing-point had shifted to legislation and an efficient organ of legislation had developed.
- (4) Usually, there was a need for one law in a political community whose several subdivisions had developed divergent local laws.

4. Codification in Anglo-American law.

In England:

The project under Henry VIII

Bacon's project (1614)

Lord Westbury's plan (1860-1863)

Gradual codification in England:

The Bills of Exchange Act (1882)

The Partnership Act (1890)

The Sale of Goods Act (1894)

The Marine Insurance Act (1906)

"Private codification"

The Anglo-Indian Codes (1837-1882)

In Australia:

The project in Victoria (1878-1882)

See Hearn, *Theory of Legal Duties and Rights*, 378-382, and appendix, 385.

In the United States:

The New York Codes (1847-1887)

The Code of Civil Procedure (1848)

Codes based on this are in force in 30 jurisdictions

The draft Civil Code (1862)

The Penal Code (1864, enacted 1887)

The draft Political Code (1865)

The Code of Criminal Procedure (1865)

Throop's Code of Civil Procedure (1876-1880)

All of Field's drafts were adopted in California, North and South Dakota, and Montana

The Massachusetts commission (1835)

The Civil Code of Georgia (1860)

The Conference of Commissioners on Uniform State Laws

The Negotiable Instruments Law

The Warehouse Receipts Act

The Sales Act

The Stock Transfer Act

The Bills of Lading Act

The Partnership Act

See Williston, *The Uniform Partnership Act, With Some Remarks on Other Uniform Commercial Laws*, 63 *University of Pennsylvania Law Rev.* 196; Vold, *Some reasons why the Code States should adopt the Uniform Sales Act*, 5 *California Law Rev.* 400, 471; Terry, *Uniform State Laws in the United States*.

"Private Codification"

The American Law Institute.

See American Law Institute, *Proceedings*, vols. 1-5 (1923-1927)

5. Objections to Codification:

(1) Defects of codes in the past.

(a) The codifiers too often had but superficial knowledge of much of the law they attempted to codify.

(b) Most codes in the past have been drawn too hurriedly.

(2) Savigny's objections:

(a) That the growth of the law is likely to be impeded or diverted into unnatural directions.

- (b) That a code made by one generation is likely to project directly or indirectly the intellectual and moral notions of the time into times when such notions have become anachronisms.

(3) Austin's objections to the French code:

- (a) That it makes no adequate provision for the incorporation of judicial interpretation from time to time.
- (b) That it was not complete and was intended to be eked out by pre-existing law.

6. Purposes of Codification:

The eighteenth-century idea.

Bentham's idea.

The idea of a code as the basis of a juristic new start.

What a code should attempt.

7. Defects of form in American law:

- (a) Want of certainty.
- (b) Waste of labor entailed by unwieldy form of the law.
- (c) Lack of means of knowledge on the part of those who seek to amend the law.
- (d) Irrationality, due to partial survival of obsolete rules.

8. The need of new premises in American law.

APPLICATION AND ENFORCEMENT OF LAW

XIX

APPLICATION AND ENFORCEMENT OF LAW

Pound, *The Enforcement of Law*, 20 *Green Bag*, 401; Pound, *Courts and Legislation*, 7 *American Political Science Review*, 361-383, *Science of Legal Method* (*Modern Legal Philosophy Series*, vol. 9), 202-228; *Science of Legal Method*, chaps. 1-5; Wigmore, *Problems of Law*, 65-101.

Geny, *Méthode d'interprétation*, 2 ed. (1919); Van der Eycken, *Méthode de l'interprétation juridique*; Mallieux, *L'exégèse des codes*; Perreau, *Technique de la jurisprudence en droit privé*; Ransson, *Essai sur l'art de juger*.

Ehrlich, *Freie Rechtsfindung und freie Rechtswissenschaft*; Gnaeus Flavius (Kantorowicz), *Der Kampf um die Rechtswissenschaft*; Fuchs, *Recht und Wahrheit in unserer heutigen Justiz*; Fuchs, *Die gemeinschädlichkeit der konstruktiven Jurisprudenz*; Oertmann, *Gesetzeszwang und Richterfreiheit*; Rumpf, *Gesetz und Richter*; Brütt, *Die Kunst der Rechtsanwendung*; Gmelin, *Quousque?* *Beiträge zur soziologischen Rechtsfindung*; Kantorowicz, *Rechtswissenschaft und Soziologie*, 11 ff.; Reichel, *Gesetz und Richterspruch*; Jellinek, *Gesetz, Gesetzesanwendung und Zweckmässigkeitserwägung*; Somló, *Juristische Grundlehre* §§ 110-122; Stammler, *Rechts und Staatstheorien der Neuzeit*, § 18; Stammler, *Aus der Vorgeschichte der Freirechtslehre*; Holdack, *Grenzen der Erkenntniss des ausländischen Rechts*; Stampe, *Grundriss der Wertbewegungslehre: Zur Einleitung in ein freirechtliches System der Schuldverhältnisse*.

Pound, *The German Movement for Reform in Legal Administration and Procedure* (with full bibliography), *Bull. Comp. Law Bureau Am. Bar Ass'n*, I (1908), 31.

Kübl, *Das Rechtsgefühl*; Riezler, *Das Rechtsgefühl*, 123-158.

Endemann, *Lehrbuch des bürgerlichen Rechts*, I, §§ 12, 13; Kohler, *Lehrbuch des bürgerlichen Rechts*, I, §§ 38-40; Heck, *Gesetzesauslegung und Interessenjurisprudenz* (§ 19 is a critique of Kohler); Planiol, *Traité élémentaire du droit civil*, 9 ed., I, §§ 199-225.

Aristotle, *Politics*, bk. iii, chap. 15 (Welldon's transl., pp. 148 ff.); Selden, *Table Talk* tit. *Equity*.

Doctor and Student, pt. 1, chaps. 16, 45; Spence, *History of the Equitable Jurisdiction of the Court of Chancery*, bk. II, chap. 1.

Ahrens, *Cours de droit naturel* (8 ed.), I, 177; Lasson, *Rechtsphilosophie*, 238-239.

Chalmers, *Trial by Jury in Civil Cases*, 7 *Law Quart. Rev.* 15; Phelps, *Juridical Equity*, § 157 and note.

Pound, *Introduction to English Translation of Saleilles, Individualization of Punishment*; Saleilles, *The Individualization of Punishment* (transl. by Mrs. Jastrow), chap. 9.

Pound, *Administrative Application of Legal Standards*, 44 *Rep. Am. Bar Ass'n*, 445.

1. Analysis of the judicial function:

- (1) Finding the law, ascertaining the legal rule to be applied.
- (2) Interpreting the rule so chosen or ascertained, that is, determining its meaning by genuine interpretation.
- (3) Applying to the cause in hand the rule so found and interpreted.

Pound, *The Theory of Judicial Decision*, 36 *Harvard Law Rev.* 940, 945 ff.

2. The technical and the discretionary in judicial administration:
Agencies in legal history for restoring or preserving the balance of the administrative element:

- (1) Fictions.
- (2) Executive dispensing power.
- (3) Interposition of praetor or chancellor on equitable grounds.
- (4) Judicial individualization.

Isaacs, *The Limits of Judicial Discretion*, 32 *Yale Law Journ.* 339.

3. Law in books and law in action.

Pound, *Law in Books and Law in Action*, 44 *Am. Law Rev.* 13; Wiel, *Public Policy in Western Water Decisions*, 1 *Cal. Law Rev.* 11; Harvey, *Some Records of Crime*, II, 6-7, note 1; Pound *Inherent and Acquired Difficulties in the Administration of Punitive Justice*, *Proc. Am. Pol. Sci. Ass'n*, 1907, 223, 234-238; Stammer, *Theorie der Rechtswissenschaft*, 130-134.

4. The modes of applying legal rules.

- (1) Analytical.
- (2) Historical.
- (3) Equitable.

5. Individualization of application in Anglo-American law.

- (1) In equity, through discretion in the exercise of jurisdiction and adaptation of remedies.
- (2) Through the jury.
- (3) Through latitude of application under the guise of choice or ascertainment of a rule.
- (4) Through standards.
 - (a) At law.
 - (b) In equity.

(5) In criminal law.

- (a) Through discretion as to prosecution.
- (b) Through power of juries to render general verdicts.
- (c) Through judicial discretion in sentence.
- (d) Through assessment of punishment by juries (statutory).
- (e) Through nominal sentence and leaving the duration of punishment, etc., to an administrative board.

(6) In petty courts.

Smith, Justice and the Poor, 56-59.

6. Individualization of application in the civil law.

(1) Equity (*aequitas*, *Billigkeit*).

Rümelin, Die Billigkeit im Recht; Ahrens, Cours de droit naturel, 8 ed., I, 177; Lasson, Rechtsphilosophie, 238-239; Stammler, Lehre von dem richtigen Rechte, 2 ed., 242-249, Husiks' transl., 288-299. See Grotius, ii, 16, 26.

(2) "Free judgment" (discretion).

Stammler, Lehre von dem richtigen Rechte, 2 ed., 118-122, Husik's transl., 123-129.

7. Individualization of application through administrative tribunals.

On administrative discretion, see Laun, Das freie Ermessen und seine Grenzen (1910), containing full bibliography; Tezner, Das freie Ermessen der Verwaltungsbehörden.

ANALYSIS OF GENERAL LEGAL CONCEPTIONS

XX

RIGHTS

1. "Necessary" conceptions and "general" conceptions.

Austin, *Jurisprudence*, 4 ed., 1107-1109; Bierling, *Juristische Prinzipienlehre*, I, 1; Somló, *Juristische Grundlehre*, 33-37.

2. Meanings of "a right."

Pound, *Legal Rights*, 26 *International Journal of Ethics*, 92.

3. History of the conception of "a right."

(1) Origins in Greek philosophy.

τὸ δίκαιον, τοῦ μὲν δίκαιον
τὸ καθήκον

Aristotle, *Nicomachean Ethics*, v, 2, 8-9, v, 4, 1-8, v, 7, 5-6; Demosthenes, *agst. Midias*, 572, 14; Diogenes Laertius, vii, 108; Cicero, *De Officiis*, i, 3.

Justice as applied to a particular case. There is no clear idea of "a right," but rather of a legally established or legally recognized moral duty.

(2) Origins in Roman procedure.

The action for a physical thing.

The action for a person judicially or formally condemned to a payment.

Buckland, *Text Book of Roman Law*, 668; Gaius, iii, § 174. See Gaius, iv, § 21.

The claim asserted generally.

The claim asserted against a particular person.

Gaius, iv, §§ 1-5; *Inst.* iv, 6, 1.

(3) *Ius* in Roman law.

(a) As what is right and just, in reason, in morals, or in ethical custom. *Dig.* i, 1, 1, pr. and § 1, i, 1, 10-11.

(b) As law — what is legally established or recognized as right and just. *Inst.* i, 2; *Dig.* i, 1, 6, i, 1, 11. In Gaius, the strict law, as distinguished from the praetorian law. Gaius, ii, §§ 146, 198, iii, § 75, iv, § 60.

(c) As a law or legal precept. *Dig.* xxii, 3, 5, 1, 17, 82, i, 3, 35, xii, 1, 1.

(d) As legal institution — rightful or customary institution legally recognized or established. Gaius, i, §§ 55, 112, 129, 158.

(e) As presence of a magistrate — where right and justice may be had. *Dig.* ii, 3.

(f) As political capacity. E. g., *ius suffragii*, *ius honorum*.

(g) As authority — legally backed customary or moral authority. E. g. *ius imperandi*, Dig. ix, 2, 37, pr.; *ius patris*, Mosaicarum et Romanarum Legum Collatio, iv, 7; persons *alieno iuri subiecti*, Inst., i, 8, pr.

(h) As power — a legally backed moral or customary power. E. g. *ius donandi uendendi concedendi*, Dig. 1, 17, 163; *ius testamenti faciendi* Dig. xxviii, 1, 6, pr.

(i) As privilege — rightful liberty legally recognized. Dig. 1, 17, 55.

(j) As legal position — rightful position under a rule of law, legally conferred advantage. E. g. *ius Latii*, Gaius, i, § 95; *ius trium liberorum*, Gaius, i, §§ 145, 194, iii, § 44; Ulpian, Regulae, iii, 1, xix, 3; *ius cognationis*, Dig. i, 1, 12.

There is no clear differentiation and no clear conception of a right.

(4) *Ius* from the XII to the XVI century.

(a) The Glossators and Commentators.

Little advance on the Roman texts.

Gloss, "*ius quid sit*," on rubric to Sext, De reg. iur.; Johannes Andreae on rubric to Sext, De reg. iur.; Bartolus on Dig. i, 1, 1.

(b) The scholastic philosophers.

Thomas Aquinas, Summa Theologica, II-II, q. 57, arts. 2-4.

No clear setting off of "a right," but suggestion of a just claim as a distinct conception.

(c) The Humanists.

Donellus, De iure civili, I, 3, 2-4 (1589).

Ius as "a right" distinctly set off as a different conception from *ius* as "right-and-law."

(5) "Right" in medieval law.

Rectum as equivalent to *ius* with most of its meanings, tending to become "that which is right as applied to my case."

See Du Cange, Glossarium ad scriptores mediae et infimi Latinitatis, sub voc. *Rectum*; Fleta, vi, c. 1, § 1. See also Co. Lit. 158b, 266a, 345a, b.

(6) Natural rights.

The transition from natural law to natural rights.

Grotius, De iure belli ac pacis, i, 1, 4; Hobbes, Leviathan, chap. 14; Dunning, Political Theories from Luther to Montesquieu, 272-276; Ritchie, Natural Rights, chaps. 1-2.

(7) The system of the Pandectists.

Windscheid, Pandekten, I, § 37a; Regelsberger, Pandekten, § 13.

(8) Jhering's setting off of the recognized interest from that which secures it.

Jhering, Geist des römischen Rechts, IIIⁱ, §§ 60-61.

(9) The system of the English analytical jurists.

Austin, Jurisprudence, lects. 12, 14-16; Holland, Jurisprudence, chap. 7.

(10) Recent German analyses.

Somló, *Juristische Grundlehre*, 439–485. See Thon, *Rechtsnorm und subjectives Recht*, chaps. 4–6; Bierling, *Kritik der juristischen Grundbegriffe*, II, 128–149.

(11) Hohfeld's analysis — see *infra* 5 (2).

4. Theories of “a right.”

- (1) The natural-law conception — a right as a recognized and secured quality.

Jus has another signification [i. e., than “law”] derived from the former, which refers to the person. In this sense *jus* (a right) is a moral quality by which a person is competent to have or to do a thing justly. — Grotius, *De iure belli ac pacis*, i, 1, 4 (1625).

That quality in a person which makes it just or right for him either to possess certain things or to do certain actions. — Rutherford, *Institutes of Natural Law*, I, 2, § 3.

- (2) Metaphysical — a right as deduced from the fundamental datum of free will.

A power over an object which, by reason of the right, is subjected to the will of the person entitled. — Puchta, *Cursus der Institutionen*, II, § 207.

A moral power over others residing in one's self. — Stahl, *Philosophie des Rechts*, 5 ed., II, 279.

See Kant, *Rechtslehre*, 2 ed., xlv–xlvii, 55–56 (Hastie's transl. 55–59, 61–62); Miller, *The Data of Jurisprudence*, 50–51, 131–132.

- (3) Jural relations — a right as a relation.

If we consider the jural and legal order, which surrounds us and presses on us from every side, we see first of all the power belonging to the individual person; a sphere in which his will rules, and rules with our concurrence. We call this power a right of that person, meaning the same thing as authority. Many call it *Recht* in the subjective sense. . . . But a more precise consideration shows us . . . the need of a deeper foundation. We find this in the jural relation (*Rechtsverhältniss*). — Savigny, *System des heutigen römischen Rechts*, I, § 4.

Each particular jural relation [is] . . . a relation between person and person, determined by a rule of law. But this determination by a rule of law consists herein: that a sphere is assigned to the individual will in which it may govern independent of the wills of others. — *Id.*, § 52.

A relation between persons, concerning an object, created by a particular fact, determined by a principle or

rule of law, for an end of human life. — Ahrens, *Cours de droit naturel*, I, § 23.

A relation sanctioned and protected by the legal order. — Kohler, *Einführung in die Rechtswissenschaft*, § 6.

Wigmore, *Summary of the Principles of Torts* (Cases on Torts, vol. 2, app. A), §§ 4–8; Korkunov, *General Theory of Law* (transl. by Hastings), §§ 27–29; Kocourek, *Jural Relations*, chaps. 1, 3 (reprinted, with some changes, from *Basic Jural Relations*, 17 *Illinois Law Rev.*, 515, and *Various Definitions of Jural Relation*, 20 *Columbia Law Rev.*, 394).

Savigny, *System des heutigen römischen Rechts*, I, §§ 4, 52–53; Puntchart, *Die fundamentalen Rechtsverhältnisse des römischen Privatrechts*, §§ 7–8; Herkless, *Jurisprudence*, 84–88; Stammer, *Theorie der Rechtswissenschaft*, 2 ed., 124–126, 135–138; Kohler, *Lehrbuch des bürgerlichen Rechts*, I, §§ 44–46.

(4) A right as liberty.

Right consisteth in liberty to do or to forbear; whereas law determineth and bindeth to one of them: so that law and right differ as much as obligation and liberty. — Hobbes, *Leviathan*, chap. 14.

Right is liberty, namely, that liberty which the civil law leaves us. — *Id.*, chap. 26.

A liberty to follow my own will in all things where that rule [i. e. a standing rule applicable to all and made by the legislative authority] prescribes not. — Locke, *Two Treatises of Government*, bk. ii, chap. 4.

By private civil right we can mean only the liberty every man possesses to preserve his existence, a liberty limited by the edicts of the sovereign power and preserved only by its authority. — Spinoza, *Tractatus Theologico-Politicus*, chap. 16.

A permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right. — Holmes, *The Common Law*, 214.

(5) A right as what is right put subjectively.

The legal order (*Recht* in the objective sense, objective right), on the basis of a concrete situation of fact, puts forth a command, requiring conduct of a certain sort, and puts this command at the free disposition of the one for whose benefit it was issued. It leaves it to him whether or not he will make use of the command and in particular whether or not he will put in action the means afforded by the legal order

against those who disobey it. His will is determining for the carrying out of the command issued by the legal order. The legal order has made its command his command. What is right has become his right. . . .

A right is a power or authority of the will conferred by the legal order. — Windscheid, *Lehrbuch des Pandektenrechts*, I, § 37.

Windscheid, *Lehrbuch des Pandektenrechts*, I, §§ 37–37a; Schuppe, *Begriff des subjektiven Rechts*, chap. 2; Affolter, *Untersuchungen über das Wesen des Rechts*, 36–43; Jellinek, *System der subjektiven öffentlichen Rechte*, 2 ed., 54–93; Pagel, *Beiträge zur philosophischen Rechtslehre*, 85–123 (critique of Schuppe).

Capitant, *Introduction à l'étude du droit civil*, 4 ed., no. 74; Roguin, *La science juridique pure*, I, §§ 87–93; Duguit, *Traité de droit constitutionnel*, 1 ed., I, no. 1, compare *Id.*, 2 ed., 6–11.

(6) A right as a secured interest.

An interest protected by law. — Jhering, *Geist des römischen Rechts*, III, § 60.

A moral or natural right is an interest recognized and protected by the rule of natural justice — an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right . . . is an interest recognized and protected by the rule of legal justice — an interest the violation of which would be a legal wrong to him whose interest it is, and respect for which is a legal duty. — Salmond, *Jurisprudence*, § 72.

There has been a controversy whether right is power or interest. The word suggests both; a power to exact a particular act or forbearance, service, or benefit, and a particular interest on account of which the power exists, from which it derives its value, with respect to which its form is determined, and which it serves to protect. But the right in itself is power. It is related to the interest as the fortification to the protected land. — Merkel, *Juristische Encyclopädie*, 2 ed., § 159, note.

Salmond, *Jurisprudence*, §§ 70–74.

Korkunov, *General Theory of Law* (transl. by Hastings), § 22; Gareis, *Science of Law* (transl. by Kocourek), 31–35.

(7) A right as a power or capacity.

The capacity or power of exacting from another or others acts or forbearances.

A party has a right when another or others are bound or obliged by the law to do or forbear towards or in regard of him. — Austin, *Jurisprudence*, lect. 16.

A capacity in one man of controlling, with the assent and assistance of the state, the actions of others. — Holland, *Jurisprudence*, chap. 7.

Austin, *Jurisprudence*, lect. 12; Gray, *Nature and Sources of the Law*, §§ 22–62; Holland, *Jurisprudence*, chaps. 7, 8, to subdiv. I; Pollock, *First Book of Jurisprudence*, 5 ed., 61–72; Markby, *Elements of Law*, 6 ed., §§ 146–160; Hearn, *Theory of Legal Duties and Rights*, chap. 8; Terry, *Leading Principles of Anglo-American Law*, §§ 113–127.

Amos, *Science of Law*, 89–97; Rattigan, *Science of Jurisprudence*, §§ 11a–20b; Miller, *The Data of Jurisprudence*, 131–132; Brown, *The Austinian Theory of Law*, 192–193.

(8) A right as a legally assertable claim.

Thon, *Rechtsnorm und subjektives Recht*, chap. 5; Bierling, *Kritik der juristischen Grundbegriffe*, II, 49–73; Somló, *Juristische Grundlehre*, §§ 125–126, 131–135.

(9) The conception of social functions.

In what, then, does this notion of social function consist? It comes to this: The individual man has no rights, nor has the collectivity rights. To speak of the rights of the individual and of the rights of society, to say that we must reconcile the rights of the individual with those of the collectivity, is to speak of things which do not exist. But every individual has a certain function to perform in society, a certain task to carry out. He can not be allowed not to perform this function, he can not be allowed not to carry out this task, because a derangement or at least a prejudice to society would result from his refraining. Moreover, every act which he does, contrary to the function which devolves upon him, will be socially repressed. But conversely, everything which he does to accomplish the mission which is his because of the place he occupies in society will be socially protected and guaranteed. — Duguit, *Les transformations générales du droit privé depuis le Code Napoléon*, 24.

Duguit in *Progress of Continental Law in the Nineteenth Century* (Continental Legal History Series, vol. 11, 74–75); Duguit, *Objective Law*, 20 *Columbia Law Rev.*, 817, 822–825 (as to this, see 41 *Harvard Law Rev.* 174, 195).

(10) Wrong made the elementary concept, instead of right and duty.

Voegelin, *Kelsen's Pure Theory of Law*, *Political Science*

Quarterly, XLII, 268, 270, 272.

See Kelsen, *Hauptprobleme der Staatsrechtslehre*, 2 ed., 567-579.

5. Analysis of the nineteenth-century conception.

(1) German analyses.

Windscheid (1862).

Subjective right $\left\{ \begin{array}{l} \text{right} \\ \text{power} \end{array} \right.$

Bierling (1877).

Anspruch (claim).

Dürfen (liberty).

Können (power).

Thon (1878).

Anspruch (claim).

Genuss (liberty).

Befugung (power).

(2) Anglo-American analyses.

Salmond (1902) —

Legal advantages	$\left\{ \begin{array}{l} \text{rights in the stricter sense} \\ \text{liberties} \\ \text{powers} \\ \text{duties} \end{array} \right.$
(rights in the wider sense)	
Legal burdens	$\left\{ \begin{array}{l} \text{disabilities} \\ \text{liabilities} \end{array} \right.$

Hohfeld (1913) —

Jural opposites	$\left\{ \begin{array}{l} \text{right} \\ \text{no-right} \end{array} \right.$	$\left\{ \begin{array}{l} \text{privilege} \\ \text{duty} \end{array} \right.$	$\left\{ \begin{array}{l} \text{power} \\ \text{disability} \end{array} \right.$	$\left\{ \begin{array}{l} \text{immunity} \\ \text{liability} \end{array} \right.$
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Jural correlatives	$\left\{ \begin{array}{l} \text{right} \\ \text{duty} \end{array} \right.$	$\left\{ \begin{array}{l} \text{privilege} \\ \text{no-right} \end{array} \right.$	$\left\{ \begin{array}{l} \text{power} \\ \text{liability} \end{array} \right.$	$\left\{ \begin{array}{l} \text{immunity} \\ \text{disability} \end{array} \right.$
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Kocourek (1927) —

Advantage $\left\{ \begin{array}{l} \text{claim} \\ \text{immunity} \\ \text{privilege} \\ \text{power} \end{array} \right.$

Disadvantage $\left\{ \begin{array}{l} \text{duty} \\ \text{disability} \\ \text{inability} \\ \text{liability} \end{array} \right.$

The wider sense —

Recognized and delimited interest plus the complex of conceptions securing it.

The stricter sense —

Capacity of asserting a recognized claim, having a correlative duty.

Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (reprint of papers in 23 *Yale Law Journ.* 16, 30, and 26 *Yale Law Journ.* 712); Kocourek, *Jural Relations*, chaps. 1, 4, 6; Kocourek, *The Hohfeld System of Fundamental Legal Concepts*, 15 *Illinois Law Rev.* 24; Husik, *Hohfeld's Jurisprudence*, 68 *University of Pennsylvania Law Rev.* 263; Corbin, *Rights and Duties*, 33 *Yale Law Journal*, 501; Randall, *Hohfeld on Jurisprudence*, 41 *Law Quarterly Rev.*, 86.

Goble, *Affirmative and Negative Legal Relations*, 4 *Illinois Law Quarterly*, 94; Clark, *Relations, Legal and Otherwise*, 5 *Id.*, 26; Goble, *Negative Legal Relations Re-examined*, 5 *Id.* 36; Kocourek, *Tabulae Minores Jurisprudentiae*, 30 *Yale Law Journ.*, 215; Corbin, *Jural Relations and their Classification*, *Id.* 226.

Bierling, *Juristische Prinzipienlehre*, I, § 12 (pp. 183–206); Somló, *Juristische Grundlehre*, §§ 127–129; Cosack, *Lehrbuch des deutschen bürgerlichen Rechts*, I, §§ 16–20.

6. Classification of rights.

Austin, *Jurisprudence*, lects. 14–16; Salmond, *Jurisprudence*, §§ 78–85; Markby, *Elements of Law*, 6 ed., §§ 161–180; Terry, *Leading Principles of Anglo-American Law*, §§ 128–138; Terry, *Arrangement of the Law*, 15 *Illinois Law Rev.* 61; Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 64–114; Kocourek, *Rights in Rem*, 68 *University of Pennsylvania Law Rev.*, 322; Kocourek, *Jural Relations*, chap. 13.

Roguin, *La science juridique pure*, III, §§ 920–1195.

XXI

POWERS

Salmond, *Jurisprudence*, § 76; Miller, *The Data of Jurisprudence*, 63–70; Hohfeld, *Fundamental Legal Conceptions*, 50–63.

Kohler, *Lehrbuch des bürgerlichen Rechts*, I, § 48; Thon, *Rechtsnorm und subjektives Recht*, chap. 7.

Ius disponendi.

Power of assignee to sue.

Powers to create or transfer title to another's property	{	Powers under the Statute of Uses.
		Power of pledgee to sell pledged property where he has possession but not ownership.
		Sale of chattels {
		of tenant
		of third person
		} taken under distress for rent.
		Sale by disseisor of chattel severed from land.*
		Sale by mortgagor of chattel severed from mortgaged land.
		Power of tenant without impeachment of waste to become owner of wood cut.
		Sale in market overt.
		Transfer after unrecorded conveyance.
		Power of carrier to sell perishable goods.
		Power of finder without clue to sell.
		Powers of sale in admiralty.
		<i>Fructus perceptio, fructus consumptio.</i>
		Transfer by legatee under probated subsequent will where prior will is afterwards probated.
		Transfer by agent who has apparent general authority.
		Sale by trustee or by one who has legal but not equitable ownership.
		Power of cutting off equitable defenses by sale to purchaser for value.

Power of promisor (at law) to transform duty to perform into duty to pay damages.†

Powers of representation.

Powers of acceptance.

Powers of rejection (election), termination (forfeiture), and revocation.

* *Branch v. Morrison*, 5 Jones Law (N. C.) 16, 6 Jones Law (N. C.) 16; *Lehigh Zinc Co. v. New Jersey Zinc Co.* 55 N. J. Law, 350, 357, and cases cited; *Phelps v. Church*, 99 Fed., 683, 685; *Stockwell v. Phelps*, 34 N. Y. 363; *Page v. Fowler*, 39 Cal. 412.

† See *Clark v. Marsiglia*, 1 Denio (N. Y.), 317.

XXII

CONDITIONS OF NON-RESTRAINT OF
NATURAL POWERS

(LIBERTY AND PRIVILEGE)

Austin, *Jurisprudence*, 4 ed., 281–283, 366–367; Salmond, *Jurisprudence*, § 75; Miller, *The Data of Jurisprudence*, 96–100, 103–108; Bigelow, *Torts*, 8 ed., 13–16; Brown, *The Austinian Theory of Law*, 180–181 (note); Bentham, *Works* (Bowring's ed.), II, 217–218; Hearn, *Theory of Legal Duties and Rights*, 133–134; Hohfeld, *Fundamental Legal Conceptions*, 38–50; Bohlen, *Incomplete Privilege*, 39 *Harvard Law Rev.*, 307; Kocourek, *Jural Relations*, 125–128.

Thon, *Rechtsnorm und subjektives Recht*, chap. 6; Somló, *Juristische Grundlehre*, §§ 128–129.

A. Liberty.

E. g. the “right to pursue a lawful calling,” the *jus abutendi* of an owner, “liberty” under the V and XIV Amendments.

Field, J., in *Butchers' Union Co. v. Crescent City Co.*, 111 U. S., 746, 756–757; Bradley, J., *Id.*, 762–763; *Quinn v. Leathem* [1901] A. C. 495, 534; *Attorney General v. Adelaide Steamship Co.* [1913] A. C., 781, 793.

Chatfield v. Wilson, 28 Vt. 49; *Phelps v. Nowlen*, 72 N. Y. 39; *Letts v. Kessler*, 54 Ohio St., 73; *Allen v. Flood* [1898] A. C., 1; Dig. I, 17, 55; *Dernburg, Pandekten*, 8 ed., I, § 34.

Harlan, J., in *Adair v. United States*, 208 U. S., 161, 174; Peckham, J., in *Allgeyer v. Louisiana*, 165 U. S., 578, 592; Holmes, J., in *Aikens v. Wisconsin*, 195, U. S., 194, 205; Black, J., in *State v. Loomis*, 115 Mo., 307, 315; O'Brien, J. in *People v. Coler*, 66 N. Y. 1, 14–17; Dodge, J., in *State v. Kreutzberg*, 114 Wis., 530, 536–537; Sutherland, J., in *Adkins v. Children's Hospital*, 261 U. S., 525, 545–546; McReynolds, J., in *Meyer v. Nebraska*, 262 U. S., 390, 399; Sutherland, J., in *Tyson v. Banton*, 273 U. S., 418.

B. Privilege.

1. *Recognized by law immediately.*

Self-defense.

Self-help.

Self-redress.

Prevention of felony.

Arrest for felony, affray, etc.

Privileges as to speech and writing.

In legal proceedings.

In administrative matters.

In legislative assemblies.

Reports of public proceedings.

Comment on and criticism of public affairs, public officers and candidates.

Private communications on privileged occasions.

Prevention of or defense against public peril — fire, flood, disease.

Defense against the public enemy.

Deviation where highway is impassable.

2. *Arising from legal transactions.*

License.

Estate without impeachment of waste.

On necessity, see: Moriaud, *Du délit nécessaire et de l'état de nécessité*; De Hoon, *De l'état de nécessité en droit pénal et civil*, *Rev. de droit Belge*, VI, 29, 79; Titze, *Notstandsrechte*; Oetker, *Ueber Notwehr und Notstand*; Neubecker, *Zwang und Notstand in rechtsvergleichender Darstellung*, I, 1-14, 107-133; Goldschmidt, *Der Notstand, ein Schuldproblem*.

Compare *Smith v. Stone*, Style, 65; *Gilbert v. Stone*, Aleyn, 35; *Cunningham v. Pitzer*, 2 W. Va. 264; *Ploof v. Putnam*, 81 Vt. 471.

XXIII

DUTIES AND LIABILITIES

Austin, *Jurisprudence*, lects. 17, 22-26; Holland, *Jurisprudence*, chap. 7; Salmond, *Jurisprudence*, § 77; Gray, *Nature and Sources of the Law*, §§ 45, 46, 59-61, 2 ed., pp. 15-17, 23-25; Korkunov, *General Theory of Law* (transl. by Hastings), § 29; Hearn, *Theory of Legal Duties and Rights*, chap. 4; Miller, *The Data of Jurisprudence*, chap. 3; Terry, *Leading Principles of Anglo-American Law*, §§ 108-112; Hohfeld, *Fundamental Legal Conceptions*, 38; Corbin, *Rights and Duties*, 33 *Yale Law Journ.* 501; Kocourek, *Jural Relations*, 9-10 note; Pound, *Introduction to the Philosophy of Law*, lect. 3.

Markby, *Elements of Law*, 6 ed., §§ 181-190; Pollock, *First Book of Jurisprudence*, 5 ed., 57-61; Rattigan, *Science of Jurisprudence*, 2 ed., § 20; Terry, *Duties, Rights, and Wrongs*, 10 *American Bar Ass'n Journal*, 123.

Bierling, *Juristische Prinzipienlehre*, I, § 11 (pp. 109-183); Somló, *Juristische Grundlehre*, §§ 123-124.

XXIV

PERSONS

1. Legal units.

Subjects of rights? Holders or bearers of rights?

(a) In general.

Gray, *Nature and Sources of the Law*, §§ 63-148, 2 ed., pp. 27-64; Salmond, *Jurisprudence*, §§ 109-114; Korkunov,

General Theory of Law (transl. by Hastings), § 28; Pollock, First Book of Jurisprudence, 5 ed., 111–129; Duguit in Progress of Continental Law in the Nineteenth Century (Continental Legal History Series, vol. 11), 87–100; Kocourek, Jural Relations, chap. 17.

Demogue, *Notions fondamentales du droit privé*, 320–382; Bierling, *Juristische Prinzipienlehre*, I, § 13; Bierling, *Kritik der juristischen Grundbegriffe*, II, 74–85; Somló, *Juristische Grundlehre*, §§ 139–143; Windscheid, *Pandekten*, I, § 49.

Miller, *Lectures on the Philosophy of Law*, lect. 11; Lasson, *System der Rechtsphilosophie*, § 41; Binder, *Philosophie des Rechts*, § 15. Roguin, *La science juridique pure*, II, §§ 620–799.

(b) “Natural” persons.

Holland, *Jurisprudence*, chap. 8, subdiv. I to ii; Markby, *Elements of Law*, §§ 131–135.

Capitant, *Introduction à l'étude du droit civil*, 4 ed., 133–192; Dernburg, *Pandekten*, 8 ed., I, § 50; Cosack, *Lehrbuch des deutschen bürgerlichen Rechts*, I, §§ 24–39; Stark, *Die Analyse des Rechts*, 236–269.

(c) Juristic persons.

Salmond, *Jurisprudence*, §§ 115–120; Holland, *Jurisprudence*, chap. 8, subdiv. I, ii; Markby, *Elements of Law*, 6 ed., §§ 136–145; Gierke, *Political Theories of the Middle Age*, Maitland's Introduction, pp. xviii–xliii; Gareis, *Science of Law* (transl. by Kocourek), 104–106; Machen, *Corporate Personality*, 24 *Harvard Law Rev.* 253, 347; Freund, *The Legal Nature of Corporations*; Laski, *The Personality of Associations*, 29 *Harvard Law Rev.* 404; Hohfeld, *Fundamental Legal Conceptions*, 197–202.

Dewey, *The Historic Background of Legal Personality*, 35 *Yale Law Journ.* 655; Vinogradoff, *Juridical Persons*, 24 *Columbia Law Rev.* 594; Geldart, *Legal Personality*, 27 *Law Quarterly Rev.* 90.

Bierling, *Kritik der juristischen Grundbegriffe*, II, 85–118; Zitelmann, *Begriff und Wesen der sogenannten juristischen Personen*; Hölder, *Natürliche und juristische Personen*; Binder, *Das Problem der juristischen Persönlichkeit*; Rümelin, *Methodisches ueber juristische Personen*; Meurer, *Die juristische Personen nach Deutschen Reichsrecht*; Meurer, *Der Begriff und Eigentümer der heiligen Sachen*; Karlowa, *Zur Lehre von den juristischen Personen*, Grünhut, *Zeitschrift für das privat und öffentliches Recht*, XV, 381; Haff, *Institutionen der Persönlichkeitslehre und des Körperschaftsrechts*; Stark, *Die Analyse des Rechts*, 270–310; Dernburg, *Pandekten*, 8 ed., I, §§ 47–50; Windscheid, *Pandekten*, I, § 57; Kohler, *Lehrbuch des deutschen bürgerlichen Rechts*, I, § 131.

Capitant, *Introduction à l'étude du droit civil*, 4 ed., 193–257; Vareilles-Sommières, *Les personnes morales*; Jusserand, *Essai sur la propriété collective*, Livre du centenaire du code civil, I, 357; Saleilles,

De la personnalité juridique, histoire et théorie; Michoud, *Théorie de la personnalité morale*, I, §§ 1-74; Lévi, *La société et l'ordre juridique*, 245-343.

2. Personality.

Savigny, *Jural Relations* (transl. by Rattigan), § 75; Sohm, *Institutes of Roman Law* (transl. by Ledlie, 2 ed.), §§ 35-36; Blackstone, *Commentaries*, I, 132; *Town of Baltimore v. Town of Chester*, 53 Vt. 315; *In re Nerac*, 35 Cal. 392; *Avery v. Everett*, 110 N. Y. 317.

3. Capacity.

Maine, *Ancient Law* (Pollock's ed.), 172-174, and Sir Frederick Pollock's note L (pp. 183-185); Holland, *Jurisprudence*, chap. 14, subdiv. II.

Ehrlich, *Die Rechtsfähigkeit*.

(a) Status.

Austin, *Jurisprudence*, lects. 40-42; Cleveland, *Status in Common Law*, 38 *Harvard Law Rev.* 1074.

Kohler, *Lehrbuch der Rechtsphilosophie*, 1 ed., 62-66 (and compare *Id.*, 3 ed., 112-116).

(b) Capacity for

{	rights
	legal transactions
	civil liability for acts
	criminal responsibility.

Gareis, *Science of Law* (transl. by Kocourek), 103.

Dernburg, *Pandekten*, 8 ed., I, §§ 39-45; Windscheid, *Pandekten*, I, §§ 54-56.

Capitant, *Introduction à l'étude du droit civil*, 4 ed., 178-192.

XXV

ACTS

Austin, *Jurisprudence*, lects. 19-21; Holland, *Jurisprudence*, chap. 8, subdiv. III; Salmond, *Jurisprudence*, §§ 120-124, 133-144; Pollock, *First Book of Jurisprudence*, 5 ed., 141-171; Markby, *Elements of Law*, 6 ed., §§ 213-274.

Rattigan, *Science of Jurisprudence*, §§ 29-63; Hegel, *Philosophy of Right* (transl. by Dyde), §§ 115-126.

1. Conception and definition.

Salmond, *Jurisprudence*, § 128; Terry, *Leading Principles of Anglo-American Law*, §§ 77-81; Kocourek, *Jural Relations*, chap. 16 (reprinted from 73 *University of Pennsylvania Law Rev.* 335).

Kohler, *Lehrbuch des deutschen bürgerlichen Rechts*, I, § 216; Binding, *Die Normen und ihre Uebertretung*, II, §§ 64-66.

2. Elements.

Salmond, *Jurisprudence*, § 128.

3. Representation.

Seavey, *The Rationale of Agency*, 29 *Yale Law Journ.*, 859.

Windscheid, *Pandekten*, I, §§ 73-74; Capitant, *Introduction à l'étude du droit civil*, 4 ed., 384-392; Planiol, *Traité élémentaire de droit civil*, 9 ed., I, nos. 298-300; Demogue, *Traité des obligations en général*, I, nos. 89-91, 147-155.

See Baty, *Vicarious Liability*.

4. Legal transactions.

Salmond, *Jurisprudence*, §§ 121-123; Terry, *Leading Principles of Anglo-American Law*, §§ 172-180.

Kohler, *Lehrbuch des deutschen bürgerlichen Rechts*, I, §§ 217-225; Capitant, *Introduction à l'étude du droit civil*, 4 ed., 294-299; Demogue, *Traité des obligations en général*, I, nos. 11-15.

(a) Conception.

Karlowa, *Das Rechtsgeschäft*; Windscheid, *Pandekten*, I, § 69; Enneccerus, *Das Rechtsgeschäft*.

Will-theory and Declaration-theory: Holland, *Jurisprudence*, 13 ed., 262-268; 1 Williston, *Contracts*, §§ 18-21; Savigny, *System des heutigen römischen Rechts*, III, § 140; Henle, *Vorstellungstheorie und Willenstheorie*; Deveux, *L'interprétation des actes juridiques privés*; Demogue, *Traité des obligations en général*, I, nos. 156-158 *bis.*; II, nos. 539-541.

(b) Form.

Dernburg, *Pandekten*, 8 ed., I, §§ 85-86; Windscheid, *Pandekten*, I, § 72; Kohler, *Lehrbuch des deutschen bürgerlichen Rechts*, I, §§ 235-237.

(c) Avoidance.

Dernburg, *Pandekten*, 8 ed., I, §§ 87-92, 107-109; Windscheid, *Pandekten*, I, §§ 78-80; Kohler, *Lehrbuch des deutschen bürgerlichen Rechts*, I, §§ 227-234; Capitant, *Introduction à l'étude du droit civil*, 4 ed., 333-360.

(d) Qualifications.

Dernburg, *Pandekten*, 8 ed., I, §§ 93-104; Windscheid, *Pandekten*, I, §§ 86-100; Kohler, *Lehrbuch des deutschen bürgerlichen Rechts*, I, §§ 249-252; Capitant, *Introduction à l'étude du droit civil*, 4 ed., 360-384.

On conditions, see particularly Langdell, *Summary of the Law of Contracts*, §§ 26-31.

5. Wrongful acts.

Salmond, *Jurisprudence*, §§ 133-141; Salmond, *The Principles of Civil Liability*, *Essays in Jurisprudence and Legal History*, 123-170; Holmes, *Common Law*, lects. 3, 4; Pound, *Introduction to the Philosophy of Law*, lect. 4.

See Hasse, *Die Culpa des römischen Rechts*; Binding, *Die Normen und ihre Uebertretung*, I, §§ 50–51, II, §§ 76–91; Egger, *Kommentar zum Schweizerischen Zivilgesetzbuch*, V, 4–5; Schreiber, *Schuld und Haftung als Begriffe der privatrechtlichen Dogmatik*; Rümelin, *Schadenersatz ohne Verschulden*; Duguit in *Progress of Continental Law in the Nineteenth Century* (Continental Legal History Series, vol. 11), 124–128; Thayer, *Liability Without Fault*, 29 *Harvard Law Rev.* 801; Smith, *Tort and Absolute Liability*, 30 *Harvard Law Rev.* 241, 319, 409; Demogue, *Fault, Risk and Apportionment of Risk in Responsibility*, 15 *Ill. Law Rev.* 369; Demogue, *Traité des obligations en général*, V, pp. 1–5.

(a) Causation.

Wigmore, *Summary of the Principles of Torts*, §§ 160–201; Smith, *Legal Cause in Actions of Tort*, 25 *Harvard Law Rev.* 103, 223, 303; Beale, *The Proximate Consequences of an Act*, 33 *Harvard Law Rev.* 633; Edgerton, *Legal Cause*, 72 *University of Pennsylvania Law Rev.*, 211, 343; McLaughlin, *Proximate Cause*, 39 *Harvard Law Rev.*, 149.

Müller, *Der Kausalzusammenhang*; Horn, *Kausalitätsbegriff im Straf- und Zivilrecht*; Rümelin, *Verwendung der Kausalbegriffe im Straf und Zivilrecht*; Endemann, *Lehrbuch des bürgerlichen Rechts*, I, § 129; Binding, *Die Normen und ihre Uebertretung*, II, §§ 92–98.

(b) Responsibility: Imputation.

Salmond, *Jurisprudence*, § 149; Terry, *Leading Principles of Anglo-American Law*, §§ 87–88.

Baty, *Vicarious Liability*.

XXVI

THINGS

Austin, *Jurisprudence*, lect. 13; Holland, *Jurisprudence*, chap. 8, subdiv. II; Markby, *Elements of Law*, §§ 126–130; Pollock, *First Book of Jurisprudence*, 5 ed., 130–140; Korkunov, *General Theory of Law* (transl. by Hastings), § 30; Gareis, *Science of Law* (transl. by Kocourek), § 19; Buckland, *Text Book of Roman Law*, 182–184; Kocourek, *Jural Relations*, chap. 18.

Dernburg, *Pandekten*, 8 ed., I, § 55; Windscheid, *Pandekten*, I, §§ 42, 137–144; Birkmeyer, *Das Vermögen im juristischen Sinn*; Bierling, *Juristische Prinzipienlehre*, I, § 14 (pp. 239–273); Fuchs, *Grundbegriffe des Sachenrechts* §§ 5–9 (1917); Capitant, *Introduction à l'étude du droit civil*, 4 ed., 259–283.

Hegel, *Philosophy of Right* (transl. by Dyde), §§ 41–44; Ahrens, *Cours du droit naturel*, II, § 54; Kohler, *Lehrbuch der Rechtsphilosophie*, 81–86.

THE SYSTEM OF LAW

XXVII

DIVISION AND CLASSIFICATION

Austin, *Jurisprudence*, lects. 43–47; Holland, *Jurisprudence*, chap. 9, last par. of chap. 7; Salmond, *Jurisprudence*, §§ 79, 81–83, 85, 86; Markby, *Elements of Law*, 6 ed., §§ 162–166; Pollock, *First Book of Jurisprudence*, 5 ed., 84–110; Korkunov, *General Theory of Law* (transl. by Hastings), §§ 32–34; Gareis, *Science of Law* (transl. by Kocourek), § 14; Pound, *Classification of Law*, 37 *Harvard Law Rev.*, 933; *Proceedings, American Law Institute*, II, 58–71, 381–425.

CLASSIFICATIONS FOR DISCUSSION AND REFERENCE

Gaius.

Public law.

Private law.

Persons.

Things.

Actions.

As to this, see Buckland, *Text Book of Roman Law*, 56–61, 599–601.

On Roman classification, see Affolter, *Das römische Institutionensystem*,

Modern Roman law (German).

Public law.

Criminal law.

Private law.

General part.

Persons.

Things.

Legal transactions.

Exercise and protection of rights.

Self-help and self-redress.

Special part.

Law of property.

Law of obligations.

Family law.

Law of inheritance.

French Civil Code (1804).

Persons.

Property.

Modes of acquiring ownership.

Succession.

Gifts *inter vivos* and wills.

Contracts.

Quasi contracts.

Delicts and quasi delicts.

Marriage.

Sale, exchange, bailment.

Partnership.

Agency.

Pledge and mortgage.

German Civil Code (1900).

General principles.

Persons { natural.
juristic.

Things.

Legal transactions.

Computation of time.

Prescription.

Exercise of rights.

Law of obligations.

Law of things.

Family law.

Law of inheritance.

Swiss Civil Code (1912).

Law of persons.

Natural persons.

Juristic persons.

Family law.

Law of inheritance.

Law of things.

Law of obligations.

Civil Code of Brazil (1917).

General part.

Persons.

Property.

Juridical facts.

Special part.

Family law.

Law of things.
 Law of obligations.
 Law of successions.

Blackstone.

Rights of persons.
 Rights of things.
 Private wrongs.
 Public wrongs.

Committee on Classification of Law, American Bar Association
 (1902).

Municipal law.

Persons.

Public.

Private.

Several classes, i. e., citizens, aliens, corporations,
 etc.

Civil rights.

Domestic relations.

Things.

Personal.

Real.

Actions.

Crimes and criminal procedure.

International law.

Public.

Private (Rep. Am. Bar Ass'n, XXV, 474-475, 1902).

Practical common-law classification (Century Digest, 1898).

Law of

- (1) Persons.
- (2) Property.
- (3) Contracts.
- (4) Torts.
- (5) Crimes.
- (6) Remedies.
- (7) Government.

Jenks (Digest of English Civil Law, 1910-1917).

General part.

Persons.

Things.

Legal Acts.

Time.

- Limitation of actions.
- Self-help.
- Obligations.
- Property law.
- Family law.
- Succession.
- Gareis.
 - Private law.
 - Law of things.
 - Rights relating to material things.
 - Rights in one's own property.
 - Iura in re aliena*.
 - Rights relating to incorporeal things.
 - Mixed law of persons and law of things.
 - Law of inheritance.
 - Law of family property, i. e., property rights between husband and wife, parent and child, etc.
 - Law of persons.
 - Family law, i. e., marriage, parent and child, etc., except as to property rights.
 - Law of obligations.
 - Public law.
 - Law of the state.
 - Constitutional law.
 - Administrative law.
 - International law (Encyklopädie der Rechtswissenschaft, 1 ed., 1887).
- Kohler.
 - Law relating to persons.
 - Law of persons.
 - Law of obligations.
 - Law relating to natural objects.
 - Hence:
 - Law of persons.
 - Law of property (including inheritance).
 - Law of obligations (Einführung in die Rechtswissenschaft, § 6).
- Cosack (1910).
 - General part.
 - The holder of rights.
 - The objects of rights.
 - The origination, modification, and termination of rights.
 - Legal transactions.

- Culpability and casualty.
- Lapse of time.
- Exercise of governmental power.
- Exercise and securing of rights.
- Special part.
 - Law of claims to performance.
 - Law of things.
 - Law of commercial paper.
 - Law of associations.
 - Law of juristic persons.
 - Family law.
 - Law of inheritance.

Planiol (1905).

- General principles.
- Persons.
- Things.
- Obligations.
- Matrimonial régimes.
- Successions.
- Gifts and testaments.

XXVIII

PROPRIETARY RIGHTS: POSSESSION

Pollock, *First Book of Jurisprudence*, 5 ed., 171–206; Salmond, *Jurisprudence*, §§ 94–107; Holland, *Jurisprudence*, chap. 11, subdiv. V to “ownership”; Markby, *Elements of Law*, 6 ed., §§ 347–399; Pollock and Wright, *Essay on Possession in the Common Law*, Introduction; Holmes, *Common Law*, lect. 6.

Dernburg, *Pandekten*, 8 ed., I, §§ 142, 145–147; Windscheid, *Pandekten*, I, § 148; Cosack, *Lehrbuch des deutschen bürgerlichen Rechts*, II, §§ 185–194.

The literature upon the nature and elements of possession is very extensive. The following are important or useful: Savigny, *Recht des Besitzes* (7 ed. by Rudorff); Bruns, *Recht des Besitzes im Mittelalter und in der Gegenwart*; Bekker, *Recht des Besitzes bei den Römern*; Jhering, *Der Besitzwille*; Kuntze, *Zur Besitzlehre*; Stintzing, *Der Besitz*; Kniep, *Der Besitz*; Rohde, *Studien im Besitzrecht*; Kress, *Besitz und Recht*; Vermond, *Théorie générale de la possession*; Salleilles, *Éléments constitutifs de la possession*; Saleilles, *La possession des meubles*; Duquesne, *Distinction de la possession et de la détention en droit romain*; Cornil, *Possession dans le droit romain*; Schwab, *La théorie possessoire objective*.

JURAL POSTULATE I.

In civilized society men must be able to assume that others will commit no intentional aggressions upon them.

JURAL POSTULATE II.

In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.

As to these postulates and those proposed in the following lectures, see Hocking, *Present Status of the Philosophy of Law and of Rights*, §§ 41-48.

Nature of proprietary rights in general.

Relation of possession to ownership.

Importance of theory of possession.

in Roman law,

in the common law.

The conception of possession.

Law or fact?

The elements of possession.

1. Physical (*corpus*).

2. Mental (*animus*).

The physical element (*naturalis possessio*, detention, custody, *Inhabung*).

The mental element (juristic possession).

Difference between Roman and Germanic theories.

Animus domini.

Animus rem sibi habendi.

Animus possidendi.

Must it be a claim to control on one's own behalf?

Servants and agents.

Mediate possession.

Representative — through agent or servant.

Through bailee — subject to demand.

— for fixed term or subject to condition.

Derivative possession.

Possession is a matter of law and of fact equally. . . . Possession is a matter of fact in so far as a non-juridical conception of pure fact (detention) lies at its foundation. . . . But possession is a matter of law in so far as legal rights are bound up with the bare existence of a conception of fact. — Savigny, *Recht des Besitzes*, § 5.

To possess a thing means to have it in one's actual control. This actual control may have a foundation in right and law or not; for the conception of possession this is indifferent. When we speak of possession, we look away from the law. But while possession is not [an institution of] right and law, it has legal consequences. — Windscheid, *Pandekten*, I, § 148.

It is merely a state of things, a fact, a mere *de facto* relation to a thing into which a man has brought himself; which, however, inasmuch as it may under certain circumstances bring about a right to the thing, enjoys in itself the protection of the law. — Wächter, *Pandekten*, § 122 (transl. by Moyle, *Institutes*, 2 ed., 336).

Possession is no [institution of] right and law, but a matter of fact. But it may be (a) the consequence of rights . . . [e. g., ownership]; (b) the originating cause of rights . . . [e. g., usucapion, adverse possession]; (c) in certain cases the mere matter of fact of possession is protected against disturbance. — Gareis, *Encyklopädie der Rechtswissenschaft*, § 17.

What is the ground of this protection? Must we not say that if possession is no [institution of] right and law, its violation is no violation of right, and hence affords no ground for its protection? — Bruns in Holtzendorff, *Encyklopädie der Rechtswissenschaft*, 5 ed., 473.

There has been much learned discussion of the question whether possession is a fact or a right. No doubt it differs from ownership in requiring a *de facto* relation between a person and an object, and to that extent it is a fact. But there is no doubt also that it has legal consequences, and if that is so it seems to be little less than quibbling to say it is not a right as well. — Moyle, *Institutes*, 2 ed., 336.

Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him. When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights; meaning, thereby, that the law helps him to constrain his neighbors, or some of them, in a way in which it would not, if all the facts in question were not true of him. Hence, any word which denotes such a group of facts connotes the rights attached to it by way of legal consequences, and any word which denotes the rights attached to a group of facts connotes the group of facts in like manner.

The word "possession" denotes such a group of facts. Hence, when we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey directly or by implication that the law will give him the advantage of the situation. Contract or property, or any other substantive notion of the law, may be analyzed in the same way, and should be treated in the same order. The only difference is that, while possession denotes the facts and connotes the consequence, property always, and contract with more uncertainty and oscillation, denote the consequence and connote the facts. — Holmes, *Common Law*, 214-215.

XXIX

PROPRIETARY RIGHTS: OWNERSHIP

1. Conception and definition.

Austin, *Jurisprudence*, concluding portion of lect. 47, lect. 48; Salmond, *Jurisprudence*, § 152; Markby, *Elements of Law*, 6 ed., §§ 307-314.

Simonton, *Austin's Classification of Proprietary Rights*, 11 *Cornell Law Quarterly*, 277.

Dernburg, *Pandekten*, 8 ed., I, §§ 155, 161; Windscheid, *Pandekten*, I, §§ 167-168; Gareis, *Science of Law* (transl. by Kocourek), 139-144.

The common-law doctrine of estates.

Markby, *Elements of Law*, 6 ed., § 333; Terry, *Leading Principles of Anglo-American Law*, § 45.

2. Analysis.

Markby, *Elements of Law*, 6 ed., §§ 307-345; Hearn, *Theory of Legal Duties and Rights*, chap. 10, § 1; Hohfeld, *Faulty Analysis in Easement Cases*, 27 *Yale Law Journ.* 66, reprinted in *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 11, 160.

Baudry-Lacantinerie, *Précis de droit civil*, 13 ed., § 1332.

Incidents of ownership:

Jus possidendi.

Jus utendi.

Jus fruendi.

Jus abutendi.

Jus disponendi.

Jus prohibendi.

3. Acquisition of ownership.

Holland, *Jurisprudence*, 13 ed., 216-222; Salmond, *Jurisprudence*, §§ 175-178; Ames, *Lectures on Legal History*, lect. 17.

Dernburg, Pandekten, 8 ed., I, § 164; Windscheid, Pandekten, I, § 170; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, II, § 195a; Planiol, Traité élémentaire de droit civil, 9 ed., nos. 257-563; Baudry-Lacantinarie, Précis de droit civil, 13 ed., §§ 1336-1337.

Roman law	Original	- Accretion (<i>alluvio</i>). - Occupation <i>res nullius</i>. <i>res derelictae</i>. <i>res hostiles</i>. <i>thesaurus</i>. - Confusion. - Accession. - Specification. <i>Fructus perceptio</i>. - Adverse possession (prescription).
	Derivative	- Delivery (<i>traditio</i>). - Adjudication. - Entry upon inheritance. <i>Legatum</i> (gift by will).
Common law	Original	- Occupancy [goods of an alien enemy.] - abandoned chattels. - wild animals. - fruits of land. - Accretion. - Sale for taxes. - Sale under judgment <i>in rem</i> (e. g. for forfeiture under revenue laws). - Adverse possession. - Accession. - Confusion.
	Derivative	- Judgment. [Marriage.] - Bankruptcy. - Succession - intestate. - testamentary. - Gift. - Sale. - Conveyance.

4. Loss of ownership.

Salmond, Jurisprudence, § 162.

5. Limited real rights (*Iura in re aliena*).

Austin, Jurisprudence, lect. 52; Salmond, Jurisprudence, § 83.

Landsberg, Das Recht des bürgerlichen Gesetzbuches, 579–583; Wieland, Das Sachenrecht des Schweizerischen Zivilgesetzbuches, I, 2, 200–201 (French transl., I, 3–4, 471–474); Endemann, Lehrbuch des bürgerlichen Rechts, 8 ed., II, § 94.

The theory of “dismemberments” of ownership: Planiol, *Traité élémentaire de droit civil*, 9 ed., I, § 2745.

For a different theory, see Crome, *System des deutschen bürgerlichen Rechts*, III, § 43.

(a) Servitudes.

Austin, Jurisprudence, lects. 49–50; Holland, Jurisprudence, 13 ed., 224–232; Salmond, Jurisprudence, § 159; Markby, *Elements of Law*, 6 ed., §§ 400–430.

Dernburg, *Pandekten*, 8 ed., I, §§ 198–201.

(i) Personal.

Roman law	{	<i>usus.</i> <i>usus fructus.</i> <i>habitatio.</i> <i>operae seruorum.</i>
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Common law	{	[easements in gross] profits in gross.
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As to leases (which in the theory of the common law belong elsewhere) see Salmond, Jurisprudence, § 158.

As to the advisability of classing these as servitudes, see: Planiol, *Traité élémentaire de droit civil*, 9 ed., I, § 2746; Colin et Capitant, *Droit civil Français*, 4 ed., I, 793–795.

(ii) Real.

Roman law	{	civil	{	rustic	{	rights of way. rights of conducting water over land. rights of drawing water from land.
				urban	{	<i>seruitus altius non tolendi,</i> <i>tigni immittendi,</i> <i>oneris ferendi,</i>
				praetorian.	{	<i>stillicidii.</i>

Common law	{	easements. profits appurtenant. covenants running with land. equitable servitudes.
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(b) Securities (liens, pledge-rights).

Salmond, Jurisprudence, § 160; Holland, Jurisprudence, 13 ed., 232-239; Markby, Elements of Law, 6 ed., §§ 443-481.

Dernburg, Pandekten, 8 ed., I, §§ 224-225; Windscheid, Pandekten, I, §§ 225-229.

Roman law	$\left\{ \begin{array}{l} fiducia. \\ pignus. \\ hypotheca \\ antichresis. \end{array} \right.$	$\left\{ \begin{array}{l} tacit. \\ conventional. \end{array} \right.$
The civil law	contractual	pledge.
		hypothecation $\left\{ \begin{array}{l} general \\ particular. \end{array} \right.$
	by operation of law	general $\left\{ \begin{array}{l} in favor of the fisc. \\ against a guardian. \\ for dos and paraphernalia. \end{array} \right.$
		particular $\left\{ \begin{array}{l} landlord's lien. \\ for money loaned to rebuild a building. \\ in favor of a pupil upon a thing acquired with his money. \\ in favor of a legatee against the heir who has withheld something from the inheritance. \end{array} \right.$
		judicial

Floating charges and preferences among creditors — see Planiol, *Traité élémentaire de droit civil*, 9 ed., II, nos. 2542-2643.

Hypothecation (contractual pledge) in French law, see *Id.*, nos. 2644-2700.

Common law	pledge.
	mortgage.
	common-law liens.
	statutory liens.
	equitable charges or liens.

6. Rights of neighbors.

Dernburg, Pandekten, 8 ed., I, §§ 162-163; Hesse, *Rechtsverhältnisse zwischen Grundstücksnachbarn*; Cosack, *Lehrbuch des deutschen bürgerlichen Rechts*, II, § 210; Colin et Capitant, *Droit civil Français*, 4 ed., I, 743-744; Baudry-Lacantinerie, *Précis de droit civil*, 13 ed., I, §§ 1723-1786.

Compare the "natural right" of support at common law.

XXX

OBLIGATIONS

JURAL POSTULATE III.

In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith, and hence

(a) will make good reasonable expectations which their promises or other conduct reasonably create;

(b) will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto;

(c) will restore specifically or by equivalent what comes to them by mistake or unanticipated situation whereby they receive, at another's expense, what they could not reasonably have expected to receive under the actual circumstances.

Pound, Introduction to the Philosophy of Law, lect. 6.

1. History.

Maine, Ancient Law, chap. 9 and Sir Frederick Pollock's note R; Kohler, Rechtsphilosophie und Universalrechtsgeschichte (in Holtzendorff, Encyklopädie der Rechtswissenschaft, 6 or 7 ed.), §§ 28-37.

2. Conception and definition.

Holland, Jurisprudence, chap. 12 to subdiv. I; Salmond, Jurisprudence, § 165.

Dernburg, Pandekten, II, §§ 1-3; Windscheid, Pandekten, II, §§ 252-253.

Saleilles, Théorie générale de l'obligation, 3 ed., 7-37; Demogue, Traité des obligations en général, I, nos. 1-10.

Savigny, Obligationenrecht, I, §§ 2-4; Bierling, Kritik der juristischen Grundbegriffe, II, 198 ff.; Kohler, Lehrbuch des bürgerlichen Rechts, II, §§ 3-8; Stammler, Recht der Schuldverhältnisse, 1-35.

3. Classification.

Salmond, Jurisprudence, § 167; Holland, Jurisprudence, chap. 12, par. before subdiv. I; Sohm, Institutes of Roman Law (transl. by Ledlie, 3 ed.), § 77; Gareis, Science of Law (transl. by Kocourek), 175.

Roman law	{	Contractual	{ <i>Ex contractu.</i> <i>Quasi ex contractu.</i>
		Delictal	{ <i>Ex delicto.</i> <i>Quasi ex delicto.</i>

Common law	{	Arising from legal transactions	{	contract.
				express trust.
		Arising from office or calling.		
		Arising from fiduciary relations.		
		Arising from unjust enrichment.		

Is the Roman conception of obligations *ex delicto* expedient for our purposes?

4. Analysis of contract.

Salmond, Jurisprudence, §§ 122–124; Holland, Jurisprudence, chap. 12, subdiv. II to par. “principles of classification”; Markby, Elements of Law, §§ 603–624, 626–648, 651–658, 663; Morawetz, Essay on the Elements of a Contract, chap. 1.

Windscheid, Pandekten, II, §§ 305–318; Dernburg, Pandekten, 8 ed. II, §§ 9–11.

- (a) Parties.
 - (b) Declaration of will.
 - (c) Presupposition.
 - (d) Form.
- “Abstract” promises.

Salmond, Jurisprudence, § 124, 6; Dernburg, Pandekten, 8 ed., II, § 22; Windscheid, Pandekten, II, §§ 318, 319, 364; Stampe, Grundriss der Wertbewegungslehre, I, §§ 4–5; Lorenzen, Causa and Consideration in the Law of Contracts, 28 Yale Law Journ. 621; Pound, Consideration in Equity, Wigmore Celebration Essays, 435.

Contracts for the benefit of a third person.

Hellwig, Verträge auf Leistung an Dritte, §§ 24, 40; Dernburg, Pandekten, 8 ed., II, § 18; Windscheid, Pandekten, II, § 316; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 162; Baudry-Lacantinerie, Précis de droit civil, 13 ed., II, §§ 60–85; Colin et Capitant, Droit Civil Français, 4 ed., II, 320–325.

Plurality of parties.

Salmond, Jurisprudence, § 166; Dernburg, Pandekten, 8 ed., II, §§ 69–75; Windscheid, Pandekten, II, §§ 292–300; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 118–119; Baudry-Lacantinerie, Précis de droit civil, 13 ed., II, §§ 266–307.

5. Classification of contracts.

- (a) With respect to form.

Roman law	{	Formal	{ verbal. literal.
		Real	{ <i>mutuum</i> . <i>commodatum</i> . <i>depositum</i> . <i>pignus</i> .
		Consensual	{ sale. letting and hiring. partnership. mandate. <i>do ut des</i> .
		Innominate	{ <i>do ut facias</i> . <i>facio ut des</i> . <i>facio ut facias</i> .
		Actionable pacts	{ <i>pacta adiecta</i> . <i>pacta praetoria</i> . <i>pacta legitima</i> .
Common law	{	Formal	{ recognizances. instruments under seal. mercantile specialties.
		Real	{ debt. bailment.
		Simple.	

(b) With respect to subject-matter.

See Holland, Jurisprudence, chap. 12, par. "rights resulting from a contract" to par. "transfer."

6. Transfer of obligations.

Holland, Jurisprudence, chap. 12, par. "transfer" to par. "extinction;" Markby, Elements of Law, 6 ed., §§ 659-672; Dernburg, Pandekten, 8 ed., II, §§ 47-53; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 114-117; Planiol, Traité élémentaire de droit civil, 9 ed., II, §§ 389-398.

7. Extinction of obligations.

Holland, Jurisprudence, chap. 12, par. "extinction" to end of chapter; Dernburg, Pandekten, 8 ed., II, §§ 64-68; Windscheid, Pandekten, II, §§ 341-361; Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, §§ 102-113; Planiol, Traité élémentaire de droit civil, 9 ed., II, §§ 399-400, 522-523, 529-609, 617-629.

OBLIGATION

The relation of one person to another whereby the one person is bound either to some performance or to forbear something. — Kohler, Einführung in die Rechtswissenschaft, § 28.

An obligatory right . . . is a right to require another person to do some act which is reducible to a money value. It is invariably directed against a determinate person. . . . Obligations are not designed to create any general control over all the acts of the debtor. A debtor can, in the last resort, rid himself of every obligation by sacrificing a corresponding portion of his property for the purpose of indemnifying his adversary. An obligation means a deduction, not from a man's liberty, but only from his property. — Sohm, *Institutes of Roman Law* (Ledlie's transl.), § 60.

CONTRACT

An expressed agreement of the wills of two or more persons for the purpose of producing an alteration in their spheres of rights. — Gareis, *Encyklopädie der Rechtswissenschaft*, § 23.

The declared agreement of two or more persons who desire to enter into an obligatory relation concerning an object of right. — Ahrens, *Cours de droit naturel*, II, § 82.

The mutually expressed agreement of certain persons over a relation of law to be created between them. — Stahl, *Philosophie des Rechts*, 5 ed., II, 412.

Those legal transactions which bring face to face several persons who have opposing interests are called agreements. They have special practical importance because, as men are compelled to live in community and are unable to do without mutual assistance, they must agree. Hence the transaction between persons with opposing interests — seller and buyer, hirer and letter, etc. — is likely to conform to the general interest and establish a wise mean.

These agreements may serve to create or to modify or to extinguish obligations.

Agreements which have for their end the creation of an obligation are known specially by the name of contracts. — Demogue, *Traité des obligations en général*, I, no. 22.

A contract is a promise or set of promises to which the law attaches legal obligation. — 1 Williston, *Contracts*, § 1.

XXXI

WRONGS

COROLLARY OF JURAL POSTULATE I.

One who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can (1) justify his act under some social or public interest, or (2) assert a

privilege because of a countervailing individual interest of his own which there is a social or a public interest in securing.

JURAL POSTULATE IV.

In civilized society men must be able to assume that others, when they act affirmatively, will do so with due care with respect to consequences that may reasonably be anticipated.

JURAL POSTULATE V.

In civilized society men must be able to assume that others who maintain things likely to get out of hand or to escape and do damage will restrain them or keep them within their proper bounds.

Hence one is liable in tort for

I. Intentional aggression upon the personality or substance of another (unless he can establish justification or privilege, according to the corollary of Postulate I).

II. Negligent interference with person or property — i. e., failure to come up to the legal standard of due care under the circumstances, while carrying on some affirmative course of conduct, whereby injury is caused to the person or substance of another.

III. Unintended non-negligent interference with the person or property of another through failure to restrain or prevent the escape of some dangerous agency which one maintains.

Holland, *Jurisprudence*, chap. 13, par. "origin" to par. "transfer"; Terry, *Leading Principles of Anglo-American Law*, §§ 524–541; Wigmore, *Responsibility for Tortious Acts: Its History*, 7 *Harv. Law Rev.* 315, 383, 441, *The Tripartite Division of Torts*, 8 *Harv. Law Rev.* 200, *A General Analysis of Tort Relations*, 8 *Harv. Law Rev.* 377, *Cases on Torts*, Preface; Bigelow, *Torts*, 8 ed., 35–39; Salmond, *Torts*, §§ 1–14.

Dernburg, *Pandekten*, 8 ed., II, § 129; Cosack, *Lehrbuch des deutschen bürgerlichen Rechts*, II, §§ 163–164; Baudry-Lacantinerie, *Précis de droit civil*, 13 ed., II, §§ 815–847.

Roman law	Delicts	Wrongful appropriation of property	{ <i>furtum</i> <i>rapina</i> .
		Injury to corporeal property	{ <i>damnum iniuria datum</i> .
		Injuries to personality	{ to the physical person or to honor, <i>iniuria</i> .
		Injuries to personality whereby substance is impaired	{ <i>dolus</i> <i>metus</i>
	Quasi delicts	{ Liability of <i>iudex</i> who "makes a case his own." Liability <i>de deictis et diffusis</i> . Noxal liability. Liability under the aedilician edict.	
Common law	Intentional aggression	a. Upon personality —	
		(i) Assault and battery.	
		(ii) Imprisonment.	
		(iii) Infringement of privacy (in dispute).	
		b. Upon personality and substance.	
		(i) Infringement of rights in the domestic relations.	
		(ii) Malicious prosecution.	
		(iii) Defamation.	
		(1) slander.	
		(2) libel.	
c. Upon substance.			
(i) Trespass upon possession.			
(1) of land.			
(2) of chattels.			
(ii) Conversion of chattels.			
(iii) Intentional interference with advantageous relations.			
(iv) Deceit.			
Negligence			
Failure to restrain or prevent escape of dangerous agencies.			

XXXII

EXERCISE AND ENFORCEMENT OF RIGHTS

1. Exercise of rights.

See references in III, A, 5, i. Also Blümner, *Lehre von böswilligen Rechtsmissbrauch*.

2. Self-help, self-redress.

Vallimaresco, *La justice privée en droit moderne*.

Dernburg, *Pandekten*, 8 ed., I, § 112; Windscheid, *Pandekten*, I, § 123; Cosack, *Lehrbuch des deutschen bürgerlichen Rechts*, I, § 78.

Saxon Navigation Co. v. Lambeg Bleaching Co., [1927] A. C. 226, 244-246.

3. Private execution.

Demogue, *Notions fondamentales du droit privé*, 638-669.

4. Administrative enforcement.

Gareis, *Science of Law* (transl. by Kocourek), § 53; Goodnow, *Comparative Administrative Law*, I, 1-24, II, 127-129; Amos, *Science of Law*, 2 ed., 396-397.

5. Judicial Enforcement : Procedure.

Holland, *Jurisprudence*, chap. 15; Salmond, *Jurisprudence*, §§ 172-176; Markby, *Elements of Law*, 6 ed., §§ 848-863; Amos, *Science of Law*, chap. 11; Gareis, *Science of Law* (transl. by Kocourek), § 50; Millar, *The Formative Principles of Civil Procedure*, 18 *Illinois Law Rev.* 1.

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Maguire, *Poverty and Civil Litigation*, 36 *Harvard Law Rev.* 361.

(a) The mode of instituting the proceeding.

Windscheid, *Pandekten*, I, §§ 124-126.

(b) Ascertainment of the facts.

(i) Pleading.

Dernburg, *Pandekten*, 7 ed., I, §§ 151-152; Garsonnet et Cézair-Bru, *Précis de procédure civile*, §§ 356-392; Hellwig, *Lehrbuch des deutschen Zivilprozessrechts*, III, §§ 141-146; Lewinski, *Courts and Procedure in Germany*, 5 *Ill. Law Rev.* 193.

(ii) Proof: Trial and finding.

Wigmore, *Principles of Judicial Proof*. Reference may be made to Bentham, *Rationale of Judicial Evidence*, 5 vols.; Gross, *Criminal Investigation* (transl. by Adam); Arnold, *Psychology as Applied to Legal Evidence*; de la Grasserie, *La Preuve*; Garsonnet et C  zar-Bru, *Pr  cis de proc  dure civile*,     401-475.

(c) Judgment.

Windscheid, *Pandekten*, I,     128-132.

The remedy { prevention.
 { specific redress.
 { substitutional redress.

Dernburg, *Pandekten*, 8 ed., I,     134-141.

As to declaratory judgments, see Sunderland, *A Modern Evolution in Remedial Rights*, 16 Mich. Law Rev. 69; Borchard, *The Declaratory Judgment*, 27 Yale Law Journ. 1; Report of Committee on Jurisprudence and Law Reform, American Bar Ass'n, 1920; *Liberty Warehouse Co. v. Grannis*, 273 U. S., 70.

(d) Execution.

Garsonnet et C  zar-Bru, *Pr  cis de proc  dure civile*,     703-718.

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Reference may be made to: *Zeitschrift für Rechtsphilosophie in Lehre und Praxis*, ed. by Holdack, Joerges, and Stammler, 3 vols., 1914-1921; *Rivista internazionale di filosofia del diritto*, ed. by Del Vecchio, Sforza, Pagano, and Vacca, 1921, by Del Vecchio, Pagano, and Vacca, 1922-1925, by Del Vecchio, Capograssi, Pagano, and Salone, 1926- . Vols 1-7 to date.

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Vol. II, history of juristic thought, transl. by Jastrow (somewhat abridged) under the title "*The World's Legal Philosophies*," 1912; vol. III, general system of legal and economic philosophy, vol. IV, philosophy of interests of substance, and vol. V, philosophy of criminal law, are important for our purpose.

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(d) *Revived Natural Law.*

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II. NEO-SCHOLASTIC

Geny, *Méthode d'interprétation en droit privé positif*, 1899, 2 ed., 2 vols., 1919.

A book of the first importance.

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On Geny, see Colmo, *La tecnica jurídica*, 1916.

Compare Cathrein, *Recht, Naturrecht und positives Recht*, 1901.

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Duguit, *L'état, le droit objectif, et la loi positive*, 1901.

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5. THE ECONOMIC INTERPRETATION

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See Del Vecchio, Sull' idea di una scienza del diritto universale comparato, 1909, transl. in Kocourek and Wigmore, Primitive and Ancient Legal Institutions (Evolution of Law Series, vol. 2) pp. 61-70 (abridged), French transl. by Francez, as L'idée de droit universel comparé, 1910, Spanish transl. by Castaño, 1911, German transl. by Hellwig, 1914; Kohler, Die Entwicklung im Recht, Grünhut's Zeitschrift für das privat und öffentliche Recht der Gegenwart, XIV, 410, 1887, transl. as "Evolution of Law" in Kocourek and Wigmore, Primitive and Ancient Legal Institutions, 3-9; Pineles, Questions de droit romain, étudiées d'après la nouvelle méthode historique du droit comparé, tr. by Herzen, 1911; Saleilles, La fonction juridique du droit comparé, Festgabe für Kohler, 164, 1909; Wenger, Römisches Recht und Rechtsphilosophie, Archiv für Rechts und Wirthschaftsphilosophie, XIV, 1, 106, 1921.

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A translation of *Le basi del diritto e dello stato*, 1893. A theory of law as the outcome of class struggles.

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See also: Post, *Ueber die Aufgaben einer allgemeinen Rechtswissenschaft*, 1891; Mazzarella, *Les types sociaux et la droit*, 1908; Neukamp, *Entwicklungsgeschichte des Rechts*, 1895; Seitz, *Biologie des geschichtlich positiven Rechts*, 1906–1910; Sen Gupta, *The Evolution of Law*, 1925.

For critiques, see Tanon, *L'évolution de droit et la conscience sociale*, 3 ed., 1911; Tourtoulon, *Principes philosophiques de l'histoire du droit*, 1908–1920; Charmont, *La renaissance du droit naturel*, 1910.

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First published in 1894.

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See also Bonucci, *L'orientazione psicologica dell'etica e della filosofia del diritto*, 1907; Bozi, *Die Weltanschauung der Jurisprudenz*, 1907, 2 ed., 1911; Bozi, *Die Schule der Jurisprudenz*, 1910; Bozi, *Einführung in das lebende Recht*, 1912–1914; Cruet, *La vie du droit et l'impuissance des lois*, 1908; de la Grasserie, *Principes sociologiques du droit civil*, 1906; Jellinek, *Die sozial-ethische Bedeutung von Recht, Unrecht und Strafe*, 2 ed., 1908 (first ed., 1878);

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For a history and critique of sociological ethics down to this point, see Cohn, *Ethik und Soziologie*, 1916.

(d) *Experimental Positivist.*

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See Tourtoulon, *Principes philosophiques de l'histoire du droit*, 491–513, English transl. (*Philosophy in the development of Law*), 416–441; Wigmore, *Problems of Law*, 48–61.

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See also Bunge, *El derecho*, 5 ed., 1920; Cosentini, *La réforme de la législation civile*, 1913 (revised and augmented transl. of *La riforma della legislazione civile*, 1911); Kelsen, *Ueber Grenzen zwischen juristischer und soziologischer Methode*, 1911; Letelier, *Jénesis del derecho*, 1919; Levi, *La société et l'ordre juridique*, 1911; Levi, *Contributi ad una teoria filosofica dell'ordine giuridico*, 1914; Spiegel, *Gesetz und Recht*, 1913; Ehrlich, *The Sociology of Law*, 36 *Harvard Law Rev.* 129 (*La sociologia del diritto*, *Rivista internazionale di filosofia del diritto*, II, 111).

9. ENCYCLOPAEDIAS

Holtzendorff, *Enzyklopädie der Rechtswissenschaft, systematisches Teil*, 7 ed., 4 vols., 1913–1915.

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10. MATERIALS FOR ANALYTICAL JURISPRUDENCE

The materials for analytical jurisprudence are drawn from the two developed systems of law:

1. The Roman or Civil law, beginning as the law of the city of Rome, became the law of the Roman empire and thus of the ancient world, and eventually, by absorption or reception from the twelfth to the eighteenth century, the law of modern Continental Europe. It is now the foundation or a principal ingredient of the law in Continental Europe (including Turkey), Scotland, Egypt, Central and South America, Quebec and Louisiana, and all French, Dutch, Spanish, or Portuguese colonies or countries settled by those peoples.

(a) *Roman Law.*

The authoritative form of the Roman law for the modern World is the *Corpus Juris Civilis*, or compilation of Roman Law by the Emperor Justinian.

Corpus Juris Civilis, ed. by Mommsen, Krueger, and Schoell, vol. 1, *Institutes* by Krueger, *Digest* by Mommsen, revised by Krueger, 14 ed., 1922, vol. 2, *Code* by Krueger, 6 ed., 1895, vol. 3, *Novels* by Schoell, 1895.

The sources prior to Justinian may be found in convenient form in:

Girard, *Textes du droit Romain*, 5 ed. 1923.

This is the best edition of the pre-Justinian sources for students.

Bruns, *Fontes iuris romani antiqui*, 7 ed., by Gradenwitz, 1912.

Covers the sources down to Justinian, except the jurists.

Krueger, Mommsen, Studemund, *Collectio librorum iuris anteiustiniani*, 3 vols., 1878–1905.

A collection of the juristic remains before Justinian and of the remains of the compilations of legislation before the Theodosian Code.

Riccobono, Baviera et Ferrini, *Fontes iuris romani anteiustiniani*, 1918.

Covers the same ground as Girard's *Textes*.

There are good English translations of the Digest of Justinian (in part), the Institutes of Justinian, and the Institutes or Commentaries of Gaius:

Monro, *The Digest of Justinian*, 2 vols., 1904–1909.

This translation extends to book XV, title 4. Monro has published separate translations of other parts as follows: Book XVII, tit. 1, on mandate; XVII, 2, on partnership; XIX, 2, on letting and hiring; XLI, 1 and 2, on acquiring property and on acquiring and losing possession; XLVII, 2, on theft (conversion of property).

Other translations of parts are: XLI, 1 and 2 by De Zulueta (recommended in preference to Monro); XLVI, 1 and 2, on sureties and givers of mandates and on novations and delegations, by Robinson.

Moyle, *English Translation of the Digest of Justinian*, 5 ed., 1913.

Abdy and Walker, *The Institutes of Justinian*, translated with notes, 1876.

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Muirhead, *Institutes of Gaius and the Rules of Ulpian*, with Translation and Notes, 3 ed., 1904.

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The following institutional books may be used:

Buckland, *Manual of Roman Private Law*, 1925.

Sohm, *Institutes of Roman Law*, transl. by Ledlie, 3 ed., 1905.

This is a translation of the 12th ed., 1905, of Sohm, *Institutionen des römischen Rechts*. The latter is now in its 17th ed., by Mitteis and Wenger, 1923.

Girard, *Manuel élémentaire du droit romain*, 7 ed., 1924.

The best book for the student on all questions of the history of Roman legal precepts and doctrines.

Czyhlarz, *Lehrbuch der Institutionen des römischen Rechts*, 18 ed., 1924.

A very useful book as an introduction to analytical jurisprudence by way of Roman Law.

The most satisfactory treatise and work of reference for English-speaking students is:

Buckland, *Textbook of Roman Law*, 1921.

(b) *The Civil Law.*

For the modern Roman Law (i. e., the Roman Law of Justinian as systematized and interpreted for the legal purposes of western Europe from the twelfth to the nineteenth century) the best works of reference are:

Windscheid, *Lehrbuch des Pandektenrechts*, 3 vols., 9 ed. by Kipp, 1906.

First ed., 1862-65. This book is of the first importance for the student of jurisprudence. It is the culmination of the analytical-historical systematic method of the nineteenth-century.

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(g) *Countries with indigenous law and Roman legal science.*

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As to the codes of the Scandinavian countries, see A. de St. Joseph, Concorde entre les codes civils étrangers et le Code Napoléon, II, 134, III, 1, III, 494.

2. The Common law, Germanic in origin, was developed by the English courts from the thirteenth to the nineteenth century, and has spread over the world with the English race. It now prevails in England and Ireland; the United States, except Louisiana, Porto Rico, and the Philippines; Canada, except Quebec; India, except Ceylon and except over Hindus and Mohammedans as to inherit-

ance and family law; and the principal British dominions and colonies, except South Africa.

It is assumed that the student has a dogmatic knowledge of Anglo-American Law

The following will be of use to the student of jurisprudence:

Blackstone, Commentaries on the Laws of England, 4 vols.,
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Kent, Commentaries on American Law, 4 vols., 12 ed., by
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Stephen, Commentaries on the Laws of England, 4 vols., 18
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Terry, Leading Principles of Anglo-American Law, 1884.

Jenks, Digest of English Civil Law, 5 books in 2 vols., 2 ed.,
1921.

The student of jurisprudence may also refer profitably to the restatement of the law now in progress under the auspices of the American Law Institute.

Account must be taken also of two other systems:

3. The Canon Law — The Law of the Church during the Middle Ages.

Corpus Juris Canonici, ed. by Friedberg, 3 vols., 1876–1882.

See also Codex iuris canonici, 1918; Sohm, Kirchenrecht, 1892; Hinschius, Kirchenrecht, 6 vols., 1896–1897; De Angelis, Praelectiones iuris canonici, 4 vols., 1877–1884; Haring, Grundzüge des katholischen Kirchenrechts, 2 ed., 1916; Gonzalez Tellez, Commentaria perpetua in singulos textus quinque librorum Decretalium Gregorii IX, 4 vols., 1673 (there are also editions of 1690, 1699, and 1713).

On the sources of the Canon Law, see Schulte, Geschichte der Quellen und Literatur des kanonischen Rechts, 3 vols., 1875–1880; Tardif, Histoire des sources du droit canonique, 1887.

4. International Law — A system of adjusting the relations of states with one another so as to meet the approval of the moral sentiment of the community of nations; an application of the principles of private law to the relations of states.

- i. *History*. See Walker, History of the Law of Nations, 1899; Westlake, Chapters on the Principles of International Law, 1894; Phillipson, International Law and Custom of Greece and Rome, 2 vols., 1911; Nys, Les Origines du droit international, 1894.

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iii. *Works of Reference.*

Calvo, *Le droit international théorique et pratique*, 6 vols., 5 ed., 1896.

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iv. *Bibliography.* See Olivart, *Bibliographie du droit international*, 2 vols. and Supplement, 1905-1912; Borchard, *Bibliography of International Law and Continental Law*, 1913.

11. MATERIALS FOR HISTORICAL JURISPRUDENCE

The materials for historical jurisprudence are drawn from (1) the history of the developed systems of law, Roman and Germanic; (2) the systems of law which obtained among peoples of some degree of civilization which did not attain to maturity because of the spread of the Roman law, or of the English law; (3) the Hindu and the Mahommedan law, which have a limited application today in British India; (4) "adatrecht" (the native customary law of the Dutch East Indies); and (5) the institutions of social control among primitive and uncivilized peoples.

For general reference:

Kocourek and Wigmore, *Sources of Ancient and Primitive Law* (in *Evolution of Law Series*), 1915.

Kocourek and Wigmore, *Primitive and Ancient Legal Institutions* (in *Evolution of Law Series*), 1915.

Kocourek and Wigmore, *Formative Influences of Legal Development* (in *Evolution of Law Series*), 1918.

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(1) HISTORY OF DEVELOPED SYSTEMS OF LAW

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A book of the first importance for the student of Jurisprudence.

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